UNIV. OF CALIFORNIA

LAW AND BUSINESS

VOLUME I

INTRODUCTION

BY

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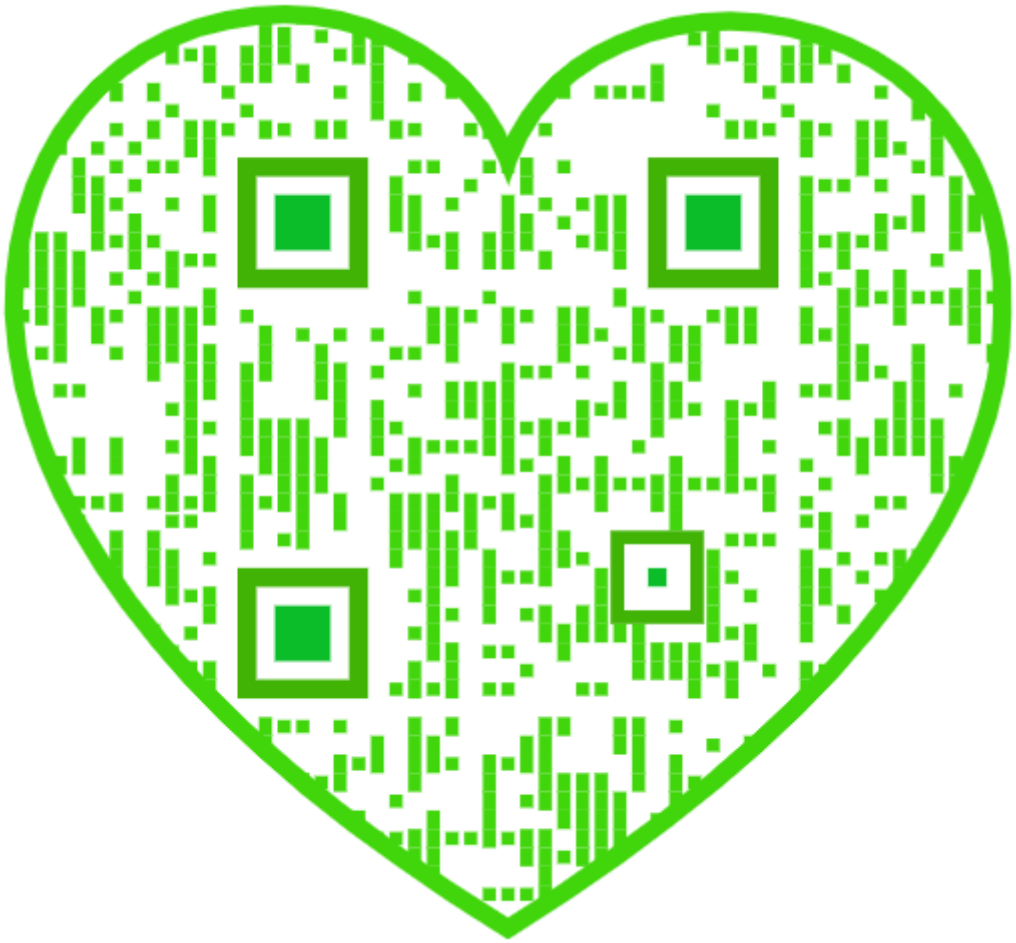

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EDITOR'S PREFACE

Collegiate training for business management is now so widely attempted that the time has arrived when experiments should be conducted looking toward the organization of the business curriculum into a coherent whole. Training in scattered "business subjects" was defensible enough in the earlier days of collegiate business training, but such a method cannot be permanent. It must yield to a more comprehensive organization.

There can be no doubt that many experiments will be conducted looking toward this goal; they are, indeed, already under way. This series, "Materials for the Study of Business," marks one stage in such an experiment in the School of Commerce and Administration of the University of Chicago.

It is appropriate that the hypotheses on which this experiment is being conducted be set forth. In general terms the reasoning back of the experiment runs as follows: The business manager administers his business under conditions imposed by his environment, both physical and social. The student should accordingly have an understanding of the physical environment. This justifies attention to the earth sciences. He should also have an understanding of the social environment and must accordingly give attention to civics, law, economics, social psychology, and other branches of the social sciences. His knowledge of environment should not be too abstract in character. It should be given practical content, and should be closely related to his knowledge of the internal problems of management. This may be accomplished through a range of courses dealing with business management wherein the student may become acquainted with such matters as the measuring aids of control, the communicating aids of control, organization policies and methods; the manager's relation to production, to labor, to finance, to technology, to risk-bearing, to the market, to social control, etc. Business is, after all, a pecuniarily organized scheme of gratifying human wants, and, properly understood, falls little, if any, short of being as broad, as inclusive, as life itself in its motives, aspirations, and social obligations. It falls little short of being as broad as all science in its technique. Training

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for the task of the business manager must have breadth and depth comparable with those of the task.

Stating the matter in another way, the modern business manager is essentially a solver of business problems—problems of business policy, of organization, and of operation. These problems, great in number and broad in scope, divide themselves into certain type groups, and in each type group there are certain types of obstacles to be overcome, as well as certain aids, or materials of solution.

If these problems are grouped (1) to show the significance of the organizing and administrative, or control, activities of the modern responsible manager, and (2) to indicate appropriate fields of training, the diagram on the opposite page (which disregards much overlapping and interacting) results. It sets forth the present hypothesis of the School of Commerce and Administration concerning the basic elements of the business curriculum.

These volumes on *Law and Business* in the series are designed to acquaint the student with the business man's problems of adjustment to his social environment.

L. C. MARSHALL

AUTHOR'S PREFACE

The materials on *Law and Business*, presented in this and in subsequent volumes, are intended primarily for use in schools of business. They are prepared to serve as a basis of instruction in the legal aspects of business and are a part of a general collection of materials for the study of business. It is hoped, however, that they may be serviceable also to departments of political science and political economy.

In attempting to fit these materials into a coherent program of business education, I have kept in mind certain definite objectives which, in my opinion, should be sought for in the teaching of law in schools of business. These objectives have been worked out in terms of purposes and aims of business education in general.

Whatever else a school of business may have ambitions to do, it is now coming generally to be agreed that its most appropriate task is to instruct its students in the fundamental principles of business administration. In the nature of things, a school of business can do little or nothing in the technical aspects of business, because these aspects vary so greatly in different business activities. It can accomplish only slightly more in giving instruction in the administration of particular businesses. But underlying all forms of business activities there are certain fundamental principles of administration and management and it is to this field that the school of business must, for the most part, confine its activities. Effort has been made to present this point of view in the preparation of these materials on *Law and Business*.

This collection of materials is presented on the theory that a thorough study of them will assist the future business man in the administration of his business. A business man, for instance, should know something of accounting, not because he is going to be an accountant, but because he will not understand his business without a knowledge of it. Accounting is a form of control and a knowledge of it is an aid to administration. A business man should know some law, not because he is going to be a lawyer, but simply because he must have some appreciation of his relation to organized society in

order to carry on his business intelligently and successfully. Law, too, is a form of control and a knowledge of it is an aid to administration.

Speaking in general terms, the real purpose of teaching law in a school is, or should be, to bring to the future business man a certain awareness of the larger problem of social control. Whether he likes it or not, he must play the game according to the rules. He must therefore be brought to a realization that one of the conditions of carrying on business in our present economic order is that he submit himself and his business to the control of society. Law is one of the most important instrumentalities of social control and it is for this reason that students preparing for business should be given instruction in it.

More specifically, there are several objectives which should be reached by a proper presentation of these materials. (1) This study should introduce the student to the whole field of the law, give him a working knowledge of legal phraseology, and prepare him for the study of case material. (2) It should assist him in visualizing more clearly the structure of modern society, by showing him the part which law and legal institutions have played in its development. (3) The study should give the student a practical knowledge of the legal devices which business men use in the administration of their affairs. (4) It should give him an appreciation of certain portions of the law which directly and intimately throw around him the lines of social control. These rules of law, commanding this, prohibiting that, and permitting the other, are important because they mark out definite limits within which business men must formulate their policies. (5) It would seem not too much to hope that upon the completion of the study of these materials the student will have become fairly skilful in analyzing court decisions. This *desideratum*, if realized, should prove to be of the greatest value to the future business man. The power to analyze a court decision will not only open up and make available for him the whole field of reported cases but will also give him a certain mental outlook and resiliency which will aid him in adjusting himself to his social environment.

An arrangement, different from the orthodox arrangement of materials for the study of law, has been adopted in the preparation of these materials. This has been done consciously with the conviction that if the teaching of law is to justify its place in the curriculum of the school of business it must be less and less law after the traditional order and more and more business after the modern view. If the

key word of business education is *administration*, and if the purpose of teaching law to the business student is to assist him in mastering the principles of administration, then it would seem that the law for him, at least, should be worked out in terms of functions, relations, or problems of the business man, and not in terms of the order in which the law has developed. The arrangement, therefore, of the content of these materials on *Law and Business* has been made on a functional basis—in terms of business problems or relations, as far as this has been possible and feasible.

The functional materials have been preceded by introductory materials to which this, the first volume, is devoted. The purpose of these is: first, to introduce the student to the whole field of the law by giving him a certain background of jurisprudence, a working knowledge of how rights are enforced, and some appreciation of the analysis of cases; second, to furnish the student with fundamental legal concepts from persons, torts, contracts, agency, and property, in preparation for the study of the functional materials which follow in later volumes; and third, incidentally to give him an appreciation of the place which law occupies in the structure of modern society. These materials are, as their name implies, an introduction to the study of *Law and Business*.

The materials which follow the Introduction are worked out in terms of the various relations or functions which seem typically characteristic of all forms of business. The first division of these materials deals with the law as it affects the business man's relation to his market. What are the legal devices which a business man may resort to in the administration of his market activities? What are the legal limitations on the choice of his market policies and practices? The second division treats of the legal problems involved in the administration of the business man's finances. What are the legal devices which assist him in getting money and credit? What are the legal devices for securing creditors? What are the remedies of creditors against their debtors? The third division deals with the law relating to risk-bearing as a function in business. To what extent does the law sanction the shifting of risks? What devices does the law furnish for the shifting of risks? The fourth division deals with the legal aspects of the business man's relation to his labor. What are the outstanding characteristics of the common-law contract of employment? What are the rights of the employer in competition with rival employers for labor? What are the rights of the employer in

competition with his employees for terms of employment? How have the various problems been dealt with in modern labor legislation? The fifth division of the materials deals with the law relating to the form of the business unit. What organization devices does the law recognize and sanction? What are the characteristics of these various organization devices? How are the various organizations formed, dissolved, and reorganized? How are they controlled, externally and internally? How are they financed?

In conclusion, something should be said concerning the methods of instruction contemplated in the preparation of these materials. Perhaps more materials have been selected than any school can adequately consider in the time allotted by the curriculum to the study of law. This, however, has been done consciously and deliberately. The fact that excess material is placed in the hands of the student will be of distinct value even though it cannot be treated in class discussion. It will tend to develop in him a spirit of research which at present is sadly lacking not only in schools of business but in law schools as well. Moreover, this excess material will afford teachers some latitude in the choice of the material which they wish to use and in the subject-matter which they wish to cover.

It is very strongly felt that the study of law in schools of business should be largely inductive and should be based on case material as far as possible. Accordingly, these materials are composed for the most part of reports of leading cases. They have been carefully selected with a view both to their pedagogical qualities and to their business content. Each case has been stripped of its nonessential features for economies in time and space, but not to such an extent, it is hoped, that the didactic character of the case has been dissipated in the process of adaptation.

Each case or unit of material is followed by a series of questions and problems. These are typically of the following kind: (1) questions which serve to bring out the technical aspects of the principal case; (2) hypothetical cases which are intended to develop the doctrine of the principal case; (3) hypothetical cases which involve corollaries of the principal case; (4) questions and cases which connect the principal case with past cases and anticipate problems in future cases; (5) exercises which encourage investigation of statutory changes in the common law; and (6) exercises which encourage the examination and drawing of forms.

Definite and beneficial results should flow from the use of these exercises, questions, and cases. They will encourage the student to do collateral reading on portions of the subject which are not covered by the materials and which cannot be discussed in the classroom. Their use will assist the student in getting at the heart of a case by stimulating him to do much of his thinking before he comes to class. The questions and cases will serve as convenient devices for getting problems quickly before the class for discussion. The exercises will be useful in directing the student to investigate statutory changes and in assigning practical work.

I am conscious of the many imperfections of the present attempt to present materials for the functional study of law in schools of business. However, I keenly feel the need of materials with such an approach and believe that the present attempt is a step in the right direction, and that for the present they will fill a growing need in colleges and universities in the study of business.

I wish to take this opportunity of expressing my gratitude to Professor Herman Oliphant, of the Law School of Columbia University, formerly of the Law School of the University of Chicago, for the aid and advice which I received from him in the preparation of these materials. My debt of gratitude to Dean L. C. Marshall, of the School of Commerce and Administration of the University of Chicago, for his help in working out the functional approach to the study of law in schools of business is no less great. I wish also to express my appreciation to Mr. J. F. Christ, of the University of Chicago, for his assistance in preparing these materials for publication.

W. H. SPENCER

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TABLE OF CONTENTS

PAGE

CHAPTER I. BACKGROUND FOR THE STUDY OF LAW

1. Origin and Nature of Law 1
2. Divisions of the Law 8
3. Systems of Law 11
4. Enforcement of Rights 18
   a) Forms of Actions 18
   b) Jurisdiction 35
   c) Pleadings 43
   d) Trial 54
   e) Appellate Review 59
5. The Study of Cases 65

CHAPTER II. PERSONS

1. Introductory Topics 82
2. Defective Persons 84

CHAPTER III. TORTS

1. Introductory Topics 111
2. Invasions of Protected Interests 114
   a) Bodily Security 114
   b) Security of Property 126
   c) Security of Reputation 158
   d) Security of Social and Economic Relations . . . 178
3. Fixing Responsibility for Invasion of Protected Interests . 181
   a) The Existence of a Voluntary Act 181
   b) The Act as a Cause of the Result Complained of . . 186
   c) The Act as a Responsible Cause of the Result Complained of 188

CHAPTER IV. CONTRACTS

1. Introductory Topics 216
2. The Formation of the Agreement 235
   a) The Offer 235
   b) The Acceptance 270
   c) The Consideration 301
3. Defective Agreements 333
   a) Agreements within the Statute of Frauds 333
   b) Illegal Agreements 342
   c) Agreements Induced by Duress 358
   d) Agreements Induced by Fraud 362

PAGE

4. Assignment of Contracts 366
5. Performance of Contracts 370
6. Discharge of Contracts 398

CHAPTER V. THE RELATION OF PRINCIPAL AND AGENT

1. Introductory Topics 409
2. Creation of the Relation of Principal and Agent . . . 410
3. Operation of the Relation of Principal and Agent . . . 439
   a) As between Principal and Agent 439
   b) As between Principal and Third Person 449
   c) As between Agent and Third Person 468
4. Termination of the Relation 478

CHAPTER VI. PRIVATE PROPERTY

1. Introductory Topics 489
2. Personal Property 495
   a) The Nature of Personal Property Rights 495
   b) Acquisition and Disposition of Personal Property Rights 510
3. Real Property. 527
   a) Development of Ownership in Land 527
      i. At Law 527
      ii. In Equity 539
   b) Estates in Land 547
      i. Nature and Characteristics of Estates 547
      ii. Enjoyment of Estates 563
      iii. Limitations on Creation of Future Estates . . . 569
   c) Transferability of Estates in Land 576
      i. In General 576
      ii. Title by Devise and Title by Descent 578
      iii. Title by Act of Parties. *Inter Vivos* 582

TABLE OF CASES 597

INDEX 599

CHAPTER I

BACKGROUND FOR THE STUDY OF LAW

1. Origin and Nature of Law

A

If man lived in complete isolation, acknowledging no superior control over him, no laws would exist for him, nor, indeed would laws be necessary. But as soon as man comes into contact with his fellowmen, friction inevitably results and controversies of one kind and another arise. In time the frequency and intensity of these controversies impel them to some organized state, however rude and simple it may be.

This state, rude and simple, does not evolve as an end unto itself. The members of it do not organize simply to be organized but they organize for the advantages which flow from an organized state. The society is rendered more secure from outside forces. Through co-operation it is easier for all to get a living, and a better living. Exchange takes place, putting their aggregate products at the disposal and within the choice of all. But with this close relation between man and man comes a multiplication of points of contact, with increasing friction and multitudinous controversies.

Likewise with the closer relation, and primarily because of the friction resulting from it, comes, consciously or unconsciously, a demand for some form or forms of control. Under such circumstances, very naturally, there evolves a variety of devices which have for their end the elimination of this friction and the settlement of these controversies. It is not to be expected that the community can be peaceful and prosperous, unless and until each member can be made to realize that he must respect the expectations, rights, and possession of another, if in turn he would have his respected. Without attempting to trace the historical development of the various devices for control, it may safely be asserted that, among them, law has, from the earliest times, been one of the most prominent instruments, effecting this desired control. It is conscious, formal, and all-pervasive. It is as strong as the governing body of the society which stands behind it and gives it sanction.

How then shall we define this thing which we call law? A definition which has had more currency probably than any other is that which Blackstone in his *Commentaries* has given:

> Municipal law, thus understood, is properly defined to be "a rule of civil conduct, prescribed by the supreme power of a state, commanding what is right and prohibiting what is wrong."[1]

This definition as laid down by Blackstone is objectionable for several reasons. By it and by the context in which it is found, it seems pretty clear that Blackstone is thinking that the authority, the supreme power of a state, behind this rule of civil conduct is external to the people.

> Its language, indeed, suggests a theocratic original; the definition, especially in connection with the discussion accompanying it, reads like an attempt to generalize the decalogue, with the substitution of words "prescribed by the supreme power of a state" for, "and God spake all these words," "the analogy being plain, that the supreme power in a state is external to the people, as God is external to His people, and so declares the law forever."[2]

But we know, in theory at least, that in our nation there is no external power in the state, which, like a Moses, categorically declares all laws for the people. However imperfectly it may work in practice, the theory of our government is that the people themselves are the final judges of what shall and what shall not be law. The legislatures and courts are but agents of the people, and responsible to them, in the enunciation of laws.

Again, all law is not entirely made up of rules commanding what is right and prohibiting what is wrong. Rather, rules of law may do one of three things. Law may forbid absolutely the doing of certain things. It may say, "You must not commit murder, you must not steal, you must not break your contracts." In the second place, it may command the doing of certain things. Finally, the law may neither forbid nor command the doing of a given act, but may, expressly, or by implication, grant permission to do it or not as one pleases. So we can say that rules of law are either prohibitive, mandatory, or permissive.

Nor does the definition under consideration indicate what standards are to be resorted to in determining what is wrong and should be

[1] 1 Blackstone, *Commentaries on the Laws of England*, p. 44.

[2] Bigelow, *Centralization and the Law*, p. 136.

prohibited, and what is right and should be commanded. But it is not unreasonable to suppose, if the assumption that the authority behind law is an external one is correct, that Blackstone thinks that this external authority bases its rules upon external and abstract principles of justice. However well this may sound in theory, as a matter of fact there are no external principles existing in the abstract, which fall from the lips of any sovereign upon his people. This is not the nature of law in any real sense.

Common law is not laid down within fixed bounds; it is peculiarly a reflection of times and conditions of society, usually tardy, but following on and changing more or less accordingly. The times may, it is true, be a long dead level, untouched by serious social change; they may be as they were in Blackstone's day and for generations before. On the other hand, they may be as they were in the first of the nineteenth century, they may be as they have been since our Civil War; they may be as they are today, fairly revolutionary. With social, economic, or political change the law may change in substance; but even in a stationary condition of society, the common law will seldom have sharply drawn lines. Even its most definite rules are almost certain to have a penumbra—a penumbra which spreads itself until the whole field becomes indistinct—to be lighted up again perhaps by a new rule, with a new penumbra, subject to the same process.[1]

What is to be commanded, prohibited, or permitted, cannot, therefore, be determined by any abstract set of rules, existing from the foundations of the world. If society were created for the benefit of law, such a theory would be tenable. But if law is simply a convenient device of control for society, the law must, if it will retain its prestige, accomodate and adjust itself to the ever-changing needs and conditions of society. No rule of conduct, whether in the form of a court decision or a legislative enactment, is worthy of the name of law which does not represent the large consensus of opinion, or which is inconsistent with the customary conduct, of the people affected by it.

B

In jurisprudential writings it is customary to emphasize the "sources of law." This is not a particularly happy phrase to describe precisely and accurately what is usually meant. In the sense that law is the expressed will of the sovereign or state, the sovereign or state may be called a formal source of law. In the sense that rules of law are found in certain physical repositories, such as statute

[1] Bigelow, *Centralization and the Law*, pp. 143–44.

books and reports of decisions, the statute books and reports are the material sources of the law. However, much legal phenomena is categorized as sources of the law which more properly should be classed and considered as formative influences.

All laws in the last analysis are operative only as they represent the will of an external sovereign or the will of the people. But laws do not spring full-fledged into existence, like a Minerva, even at the behest of a sovereign or a state. Laws have their antecedents in customary conduct approved and sanctioned by the folk of the community.

> The folk ways are the "right" ways to satisfy all interest because they are traditional and exist in fact. They extend over the whole of life. There is a right way to catch game, to cure disease, to win a wife, to make one's self appear, to honor guests, to treat comrades or strangers, to behave when a child is born, on the war path, in the council, and so on in all the cases which can arise.[1]

Just why and how these ways originated is not easy in all cases to determine. Some in the beginning no doubt arose quite accidentally. Some had their origin in convenience and expediency. Many represent a delicate adjustment between conflicting interests. In any event a great number of influences were operative in the shaping, molding, and directing of their growth. But it is important to note that "before a custom is formed there is no juristic reason for its taking one way rather than another."[2]

When these customary ways have fairly well covered the activities of a community, and have become more or less stable, every member of the community is expected to act in accordance with them. Not to act in accordance with these ways is to disappoint the expectations of those with whom one comes in contact and with whom one has dealings. This disappointment of expectations may be the breach of a promise to do something, it may be an infringement of another's property rights, or it may be a violation of another's personal security. But whatever form it takes, it disturbs the even tenor of things and usually results in frictions and controversies.

> What is demanded at this stage of human progress is not some new law, for the conception even of legislation does not yet exist, but some properly qualified judge, and some method of compelling the appearance of an adversary before him, that is to say, a method of *procedure*. An existing

[1] Sumner, *Folkways*, p. 1.

[2] Holland, *Jurisprudence* (7th ed.), p. 51.

dispute between men must, of necessity, consist of a difference of opinion concerning the conduct which one is entitled to expect from the other, and the expectation of either party can be justified only by an appeal to what he supposes to be the existing rule or custom applicable to the case. Neither party will assert a new rule, for that would of itself condemn him. Accordingly we find that the first step in the way of improving the administration of justice is to establish a tribunal for the sole purpose of determining controversies. This is the beginning of Procedure, and procedure presupposes an already existing law, or something standing in the place of law which is to be administered by it.[1]

With the development of tribunals and legislative bodies, the folkways or customary ways receive the sanction of the sovereign or state, and evolve as laws and institutions and are enunciated in one of two ways by (1) legislative enactment, or (2) judicial decision.

Legislative enactment may take the form of (*a*) a constitution or (*b*) a statute. Constitutional legislation concerns itself typically with the organization of the government, its powers and activities, and may crystallize within itself certain principles and policies which are regarded as enduring and fundamental. A greater degree of permanence is given to constitutional legislation than to ordinary legislation by various devices which the people have created for rendering difficult the adopting and changing of such legislation. Statutes or ordinary legislation emanate from legislative bodies created by the constitution and are operative only in so far as they are consistent with the constitutional legislation.

Legislative bodies, though they may and perhaps should, follow public opinion at a respectful distance, can take the initiative in the pronouncement of laws. One writer in this connection has said:

> It is not, therefore, possible to make law by legislative action. Its utmost power is to offer a reward or threaten a punishment as a consequence of particular conduct, and thus furnish an additional motive to influence conduct. When such power is exerted to reinforce custom and prevent violations of it, it may be effectual, and rules or commands, thus enacted are properly called laws; but if aimed at established custom, they will be ineffectual.[2]

In other words a law which outruns public opinion will not be enforced, and one which lags behind will sooner or later become obsolete. Where legislative enactments exist, they constitute the direct, expressed, and exclusive will of the sovereign or state.

[1] Carter, *The Law, Its Origin, Growth, and Function*, p. 31. [2] *Ibid.*, p. 130.

Laws are also enunciated by courts in deciding controversies which come before them for settlement. Theoretically the judges in handing down their decisions are only speaking the law as it exists. Blackstone says: "They are the depositaries of the law: the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land."[1]

Again, courts are "not delegated to pronounce a new law, but to expound an old law."[2] Though this may be true theoretically, actually courts frequently go far beyond this.

The courts in all countries have necessarily been intrusted with a certain power of making rules for cases not provided for originally, and even of modifying existing laws from time to time to carry out the current ideas of what is equitable, or to adapt them to the changing needs of society.[3]

When a court of competent jurisdiction has once laid down a rule of law in deciding a controversy, that rule of law becomes a binding precedent upon it and all subordinate courts of the same jurisdiction for the future. This is known as the doctrine of *stare decisis*—standing by past decisions. It is not to be concluded, however, that a principle of law, palpably wrong, once enunciated must continue in force until changed by legislative action of the state. The court may, and frequently does, upon reconsideration of the same question, either in the same or another controversy, reverse the former decision and lay down a different principle of law. "Of course, I am not saying that we must consecrate the mere blunders of those who went before us and stumble every time they stumbled. A palpable mistake, violating justice, reason and law, must be corrected, no matter by whom it may have been committed."[4]

Courts also exercise no small degree of power in the enunciation of laws in two other respects. In the first place, all legislative enactments are interpreted by courts of law. Through this power courts may read into laws that which the legislature never contemplated; or courts may, in the interpretation of statutes, render them to a greater or lesser degree ineffective. In the second place, courts in the United States pass upon the constitutionality of all legislative enactments. In the exercise of this power courts have praetorian power of life and death over legislative enactments of doubtful kind.

[1] 1 Blackstone, *Commentaries on the Laws of England*, p. 69.

[2] *Ibid.*, p. 69. [3] Holland, *Jurisprudence* (7th ed.), pp. 57–58.

[4] *McDowell* v. *Oyer*, 21 Pa. St. 417.

A great variety of forces and influences are constantly at play, shaping and molding the growth of laws. Customs and usages of the community, to a greater or lesser degree, still guide courts and legislatures in the making and changing of laws. Public opinion is ever undermining the decaying structure of the law, and laying more solid foundations, whether through the gradual changes in decisions or in the more sudden and mechanical changes through legislation. Religion has always played an important rôle in the development of the law. "It has long been laid down and has only recently been questioned that 'Christianity is a part of the law of England'"[1] Changes in ethical standards are sooner or later followed by corresponding changes in law. Changing social and economic conditions are reflected in decisions and statutes. An agricultural England developed one set of laws, a trading England developed another set of laws, and an industrial England developed still another set. The tenets of different systems of philosophy have crept into the law, and permeated it at one time and another. Legal scholars by means of historical, analytical or teleological discussions have been influential in clarifying obscurities in the law and directing its growth.

QUESTIONS

1. What is law? What is meant by natural law? The law of nature? Divine law? The law of the heavenly bodies? The law of fashions?
2. Are law and justice synonymous? If not, what is the relation of the one to the other?
3. What is the relation of law to the state? To organized society?
4. "Law as defined by Blackstone depends upon the existence of an external authority." What is meant by this?
5. Upon what other kind of authority may law rest? What practical difference does it make whether one view or the other is taken as to the kind of authority behind law?
6. "Law commands what is right and prohibits what is wrong." What are the standards of right and wrong?
7. "Every one is presumed to know the law." "Ignorance of the law is no excuse." Do these statements mean the same thing? Do you agree with either?
8. In what sense are rules of law prescribed?
9. Give an example of a mandatory rule of law; of a prohibitive rule; of a permissive rule.
10. With which statements do you agree? "Courts declare law." "Courts make law." "Courts formulate rules of law from customary conduct."

[1] Holland, *Jurisprudence* (7th ed.), p. 56.

11. "A precedent is but an authenticated custom. It is like the coin of the realm. It bears the public stamp which evidences its genuineness." What is meant by this?
12. Who or what determines the customary ways of doing things?
13. What is the relation of public opinion, if any, to customary conduct? Of public opinion to law?
14. Does customary conduct become law by virtue of its being acquiesced in by the majority of the people in a given community?
15. "Since conformity to custom is the necessary form which human conduct assumes in social dealings, it is the only just and right form. No other standard can be created over it." What is meant by this? Do you agree with the statement?
16. Can you point to any evidence that laws are now being shaped and molded by customary conduct?
17. What is meant by the statement that "legislatures cannot make law"?

2. Divisions of the Law

A[1]

Numerous attempts have been made to classify the enormous mass of legal rules and principles which constitute a legal system, in order to make it more understandable and more easily mastered. If the purpose is primarily scientific, the attempt is to make a logical classification of the material so that the groups of rules shall be mutually exclusive. On the other hand, if the purpose of the classification is primarily practical—to make the rules applicable to a given situation easy of access—considerations of logic give way to the desire to secure ease of reference. Hence, classifications designed for the use of lawyers in practice divide the law into numerous groups of closely related topics, the boundary lines of which are drawn with more regard for practical convenience than for logical accuracy. These groupings, however, are by no means arbitrary. At bottom they are logical; but historical reasons and the test of practical use have led to modifications which disguise in some measure their underlying scientific character. Thus, the usual classifications of law are based on the nature of the relations with which each department of the law deals. Law is first divided into public and private law, the former dealing with relations between the state and individuals, and the latter with the relations of private individuals and groups with each other.

[1] Taken by permission from C. A. Huston, *Law, Its Origin, Nature and Development*, 1 M. A. L., pp. 87–90. (Blackstone Institute, Chicago, 1914.)

Public law includes constitutional law, dealing with the organization and larger functions of the state, and administrative law, dealing with the relations arising between the government and individuals in the exercise of the various governmental functions. Criminal law, which deals with the absolute duties of the individual to the community, is generally treated as a branch of public law, since the protection of these community interests is in modern societies intrusted almost entirely to the state.

Private law is divided into the law of persons, the law of things or property, and the law of obligations. This classification is based on the nature of the rights considered in each subdivision. The law of persons treats of those rights *in rem* which protect the personal interests in life, physical integrity, health, and honor, in personal liberty and in various personal relationships—for example, the domestic relationships of marriage, parentage, and guardianship and those other relationships which involve status or legal disability of some sort, such as infancy, alienage, and lunacy. The law of property deals with those rights *in rem* which protect the economic interests in ownership, possession, and kindred relations to things material and immaterial. The law of obligations is concerned with the rights *in personam* which protect the interests in legal agreements (contracts), or which are granted remedially by way of prevention, enforcement, or compensation where a pre-existing right *in rem* may be or has been violated. The law of torts and quasi-contracts, and much of the law administered in proceedings in equity, are concerned with these rights *in personam*.

These are the general divisions of our legal system; but for the purposes of ready reference further subdivision is required in those departments of the law which have been most elaborately developed; for example, that part of the law of obligations dealing with contracts, which in a highly organized industrial and commercial civilization has been worked out by the process of litigation and legislation into great detail. Thus, besides a general law of contracts embodying those rules which are of fundamental importance and general application, there are special laws governing contractual obligations created in sales, insurance, agency, bills and notes, and other special relations, originating in agreement but having legal peculiarities due to the essential nature of the relation or to historical reasons connected with the legal recognition of the particular interest.

B

The recognition of rights and duties in the abstract by society would mean little or nothing to the individual if there were not machinery for the enforcement of these rights and duties. It would be of little value to P to tell him that he has a contract with D if some machinery is not provided by which P can compel D to perform the obligation which he assumed under the contract.

The recognition of rights and duties in the abstract and the creation of machinery for their enforcement would mean but little more if at the same time rules were not formulated for the regulation and control of the machinery by which these rights and duties are made real and actual.

This leads to a fundamental distinction running through the whole of the law—the distinction between substantive law and adjective law. Substantive law is that part of the law which deals with the rights and duties of the individual in the abstract. Adjective law, on the other hand, is that part of the law which controls the machinery —the judicial organization and its auxiliary adjuncts—in the process of enforcing these rights and duties.

Substantive law, for instance, tells us that if D negligently injures P the latter is entitled to collect damages by way of compensation from the former. But this abstract rule of the substantive law will not *per se* indemnify P. He must set the legal machinery in motion and watch its operations throughout if he would collect damages. The adjective law will tell him how he must institute proceedings against D; how he can get D into court; how he must state his claim against D; how he can answer defenses which D may set up; the kind of evidence with which he can prove his claim and how he must introduce it; how he can secure a review of the proceedings if he thinks that the trial court has committed errors; and how, in case he secures a judgment for damages, he can get satisfaction of the judgment.

From the foregoing the student should see

that the mere sum of existing duties and rights is not the law, nor even a separable or working portion of the law. It is but one element, the positive or static element as one might call it. In order to build up the organic life of law we have need of the genetic element, the principles which determine the positive rules in their concrete application to persons, acts and events and of the dynamic element, the rules whereby legal consequences are made manifest and worked out.[1]

[1] Pollock, *A First Book on Jurisprudence*, pp. 78–79.

QUESTIONS

1. Draw up in outline form a classification of the rules of law.
2. What is the difference between public and private law? Is the distinction one of kind or one of degree?
3. What is the difference between substantive and adjective law?
4. What is included under adjective law?
5. Can you conceive of an existing legal right where there is no remedy for its enforcement?
6. What is included under the law of persons? The law of obligations? The law of property? The law of wrongs?
7. With what subject-matter does constitutional law deal? Administrative law?
8. What is the content of criminal law? Is criminal law classed as public or private law?

3. Systems of Law

A[1]

Different civilizations have developed different systems of administering justice according to law. In the western world, however, two great systems divide the field. These are usually designed as the civil and the common law.

The civil law prevails over all Europe except England, Ireland, and Wales, and over all the Americas except the United States and Canada. In the United States, Louisiana, Porto Rico, and the Philippines are under legal systems derived in the main from the civil law; and the same is true of Quebec in Canada. In general, the division is one between the English-speaking world and the rest of western civilization. Of the British colonies, Ceylon and South Africa are under civil law, and India under the common law, with some concessions to Mohammedan and Hindu law.

The term "common law," however, besides this use to distinguish the Anglo-American legal system from the civil or Roman law system, has at least three other more restricted meanings. Within the Anglo-American legal system the expression "common law" is used to distinguish the unenacted law developed in courts of justice from the law established by legislatures. Thus common law is set off against statute law. Again, a distinction is made between "common law" and equity. The latter term, as will shortly appear, is applied to the law developed and recognized only in the English

[1] Taken by permission from C. A. Huston, *Law, Its Origin, Nature and Development*, 1 M. A. L., pp. 90–92. (Blackstone Institute, Chicago, 1914.)

Court of Chancery and its American analogies. When set in contrast with this, the common law refers to all the law, enacted or judicially developed which is recognized and administered in other courts than courts of equity. In still another usage the term "common law" is used to designate the general law of the land as contrasted with various forms of special law, which have a limited application, such as local customary law, and the canon law, or the law merchant.

One must note that, in the largest use of the term, the common law, as a body of rules and the principles for the administration of justice, distinguished from the civil law, is not the physically sanctioned law of any particular state. In a sense it is true that there is one common law of Massachusetts and another of Illinois. But, with the exceptions already noted of Louisiana and our insular possessions, there is a single body of principles common to all our jurisdictions; a body which in the main has been received by those jurisdictions as their particular sanctioned law, and which, by its influence as a source of persuasive authority and a training ground for legal thinking, maintains a general conformity to the original English type of all the independent jurisdictions where justice is administered according to the common law.

B[1]

But the extraordinary court, or court of equity, is now become the court of great judicial consequence. This distinction between law and equity, as administered in different courts, is not at present known, nor seems to have ever been known, in any other country at any time: and yet the difference of one from the other, when administered by the same court, was perfectly familiar to the Romans; the *ius praetorium*, or discretion of the praetor, being distinct from the *leges* or standing laws: but the power of both centered in one and the same magistrate, who was equally intrusted to pronounce the rule of law, and to apply it to particular cases by the principles of equity. With us, too, the *aula regia*, which was the supreme court of judicature, and undoubtedly administered equal justice according to the rules of both or either, as the case might chance to require: and, when that was broken to pieces, the idea of a court of equity, as distinguished from a court of law, did not subsist in the original plan of partition. For though equity is mentioned by Bracton as a thing contrasted to strict law, yet neither in that writer, nor in Glanvil

[1] 3 Blackstone, *Commentaries on the Laws of England*, pp. 49–55.

or Fleta, nor yet in Britton (composed under the auspices and in the name of Edward I and treating particularly of courts and their several jurisdictions) is there a syllable to be found relating to the equitable jurisdiction of the court of chancery. It seems therefore probable, that when the courts of law, proceeding merely upon the ground of the king's original writs and confining themselves strictly to that bottom, gave a harsh or imperfect judgment, the application for redress used to be to the king in person assisted by his privy council; and they were wont to refer the matter either to the chancellor and a select committee, or by degrees to the chancellor only, who mitigated the severity or supplied the defects of the judgments pronounced in the courts of law, upon weighing the circumstances of the case. This was the custom not only among our Saxon ancestors before the institution of the *aula regia*, but also after its dissolution, in the reign of Edward I, and perhaps during its continuance, in that of Henry II.

In these early times the chief juridical employment of the chancellor must have been in devising new writs, directed to the courts of common law, to give remedy in cases where none was before administered. And to quicken the diligence of the clerks in chancery, who were much too attached to ancient precedents, it is provided by statute Westm. 2, 13 Edw. I. c. 24 that "whenever from thenceforth in one case a writ shall be found in the chancery, and in a like case falling under the same right and requiring like remedy no precedent of a writ can be produced, the clerks in chancery shall agree in forming a new one: and, if they cannot agree, it shall be adjourned to the next parliament, where a new writ shall be framed by consent of the learned in the law, lest it happen for the future that the court of our lord the king be deficient in doing justice to suitors." And this accounts for the very great variety of writs of trespass on the case, to be met within the register: whereby the suitor had ready relief, according to the exigency of his business, and adapted to the specialty, reason, and equity of his very case. Which provision (with a little accuracy in the clerks of the chancery, and a little liberality in the judges, by extending rather than narrowing the remedial effects of the writ) might have effectually answered all the purposes of a court of equity; except that of obtaining a discovery by the oath of the defendant.

But when, about the end of the reign of King Edward III, uses of land were introduced, and, though totally discountenanced by

the courts of common law, were considered as fiduciary deposits and binding in conscience by the clergy, the separate jurisdiction of the chancery as a court of equity began to be established; and John Waltham, who was Bishop of Salisbury and chancellor to King Richard II, by a strained interpretation of the above-mentioned statute of Westm. 2 devised the writ of subpoena, returning to the court of chancery only, to make the feoffee to uses accountable to the *cestui que use:* which process was afterwards extended to other matters wholly determinable at the common law, upon false and fictitious suggestions; for which therefore the chancellor himself is by statute 17 Ric. II. 6. directed to give damages to the party unjustly aggrieved.

No regular judicial system at that time prevailed in the court; but the suitor, when he felt himself aggrieved, found a desolutory and certain remedy, according to the private opinion of the chancellor, who was generally an ecclesiastic, or sometimes (though rarely) a statesman: no lawyer having sat in the court of chancery from the times of the chief justices Thorpe and Knyvet, successively chancellors to King Edward III in 1372 and 1373, to the promotion of Sir Thomas More by King Henry VIII in 1530. After which the great seal was indiscriminately committed to the custody of lawyers, or courtiers, or churchmen, according as the convenience of the times and the disposition of the prince required, till Sergeant Puckering was made Lord Keeper in 1592: from which time to the present, excepting the interval from 1621 to 1625, when the seal was intrusted to Dr. Williams, then Dean of Westminster, but afterward Bishop of Lincoln; who had been chaplain to Lord Ellesmere, when chancellor.

In the time of Lord Ellesmere (A.D. 1616) arose that notable dispute between the courts of law and equity, set on foot by Sir Edward Coke, then chief justice of the Court of King's Bench; whether a court of equity could give relief after or against a judgment at the common law. This contest was so warmly carried on that indictments were preferred against the suitors, the solicitors, the counsel, and even a master in chancery, for having incurred a *praemunire*, by questioning in a court of equity a judgment of the Court of King's Bench, obtained by gross fraud and imposition. This matter, being brought before the king, was by him referred to his learned counsel for their advice and opinion; who reported so strongly in favor of the courts of equity, that his majesty gave judgment on their behalf: but not contented with the irrefragable reasons and precedents produced

by his counsel (for the chief justice was clearly in the wrong), he chose rather to decide the question by referring it to the plenitude of his royal prerogative.

Lord Bacon, who succeeded Lord Ellesmere, reduced the practice of the court into a more regular system; but did not sit long enough to effect any considerable revolution in the science itself; and few of his decrees which have reached us are of any great importance to posterity. His successors, in the reign of Charles I, did little to improve his plan; and even after the restoration the seal was committed to the Earl of Clarendon, who had withdrawn from practice nearly twenty years; and afterwards to the Earl of Shaftesbury, who (though a lawyer by education) had never practiced at all. Sir Heneage Finch, who succeeded in 1673, and became afterwards Earl of Nottingham, was a person of the greatest abilities and most uncorrupted integrity; a thorough master and zealous defender of the laws and constitution of his country; and endued with a pervading genius, that enabled him to discover and to pursue the true spirit of justice, notwithstanding the embarrassments raised by the narrow and technical notions which then prevailed in the courts of law, and the imperfect ideas of relief which had possessed the courts of equity. The reason and necessities of mankind, arising from the great change in property by the extension of trade and the abolition of military tenures, co-operated in establishing his plan, and enabled him in the course of nine years to build a system of jurisprudence and jurisdiction upon wide and rational foundations; which have also been extended, and improved by many great men, who have since presided in chancery. And from that time to this, the power and business of the court have increased to an amazing degree.

C[1]

Not only did the chancellor and court of chancery exercise a new jurisdiction by enforcing rights not recognized in the common law courts, like that of the trust in land mentioned in the subsection above, but they also interfered with the exercise of admitted common law rights, in certain cases where such rights were being unfairly exercised by the injury of another. For instance, suppose A obtains from B, by fraud, a bond for the payment of money. The possession of this bond, although thus obtained, gave A a perfect legal right to collect

[1] Taken by permission from J. P. Hall, 1 *American Law and Procedure*, Introduction, sections 31–33. (La Salle Extension University, 1910.)

the money in a suit on the bond in the common law courts—fraud not being a defence in such a case. From the fifteenth century, however, the chancellor would enjoin A from collecting a bond obtained by fraud, and imprison him for disobedience. More than this, the chancellor would even forbid the execution of a judgment obtained in the common law courts themselves, if it was granted by fraud. This latter jurisdiction excited great opposition from the common law courts, and, after a controversy, in Parliament and out of it, extending over more than a century, Chief Justice Coke attempted in 1615 to enlist the aid of King James I to forbid this chancery jurisdiction. A commission, to which the matter was referred for investigation, reported in favor of the Chancellor's practice. The king approved the report and thus finally settled the dispute.

The early chancellors, in the formative period of their jurisdiction, necessarily were not governed by fixed rules in granting their relief; and, for various reasons, the principles upon which they acted were much more vague and ill-defined than the doctrines of the common law. For a long time this gave point to the jest of Selden that "Equity is a roguish thing, varying with the length of the Chancellor's foot." After the restoration of Charles II to the throne, Lord Nottingham became chancellor, and during his term of office the principles of equitable relief were so systematized and explained in his decisions that he has become known as the "Father of Equity." Two other great chancellors contributed notably to the completion of equity as a system—Lord Hardwicke in the middle of the eighteenth century, and Lord Eldon in the first quarter of the nineteenth. Under the latter the system assumed its final form, and since his time, it is rare that courts of equity have exercised a jurisdiction more extensive than that finally established by Lord Eldon.

Not only did equity recognize and enforce useful rights unknown to the common law, but it supplemented the remedial deficiencies of the older system in many ways indispensable to the needs of modern society. The common law had almost no preventive power; it could only redress injuries after they had occurred. Equity restrained threatened wrongs by issuing injunctions and parties were thus enabled to have their rights determined in advance of the infliction of the actual injury. In most instances the common law did not give a plaintiff what he had bargained for, but only money damages. It did not order the defendant to discharge any duty he owed the plaintiff, but it merely gave such reparation as could be gained from

the seizure of the defendant's property. Equity ordered the defendant to perform his obligation in many cases where paying for the breach of it would not amount to performance. The common law could not deal with more than two sets of parties in a single litigation. Cases of the interrelated rights of several persons, as in cases of suretyship, partnership, and bankruptcy, could not be adequately handled in a common law court. A critically situated business could not be nursed along by a receivership at common law. No judgment could be given, conditional upon the performance of future acts by other parties. A common law judgment was either absolutely given or denied. In all of these respects equity afforded flexible remedies, and a procedure that adapted itself to the demands of business and of justice. When the two systems were finally fused in England, in the latter part of the nineteenth century, the consolidating statute provided that wherever the rules of the law and of equity applicable to a case differed, the equity rule should be administered by the court. In most American states, the two systems of law and equity are administered by the same courts and judges, but their separate doctrines are preserved in a manner that has an important effect upon both the form and substance of judicial relief.

D[1]

In addition to the systems of common law and equity, there have been at various times in England several other systems of law, having separate courts and providing different rules from the courts of law and equity. The more important of these were admiralty and the canon law, and the law merchant. Admiralty law dealt with maritime affairs, and this jurisdiction is still preserved distinct from law and equity in both England and in the United States. In this country it is exclusively administered by the Federal courts. Canon law dealt with ecclesiastical affairs, a term that earlier included much more than it does now. Marriage and divorce, wills of personal property, all offences against morals—these were within the early jurisdiction of the ecclesiastical courts, as well as matters that actually concerned the church and ecclesiastics. The English reforms of the nineteenth century swept away substantially all of this jurisdiction except over church discipline. In America there are no ecclesiastical state courts because there is no official or established religion. The law merchant

[1] Taken by permission from J. P. Hall, 1 *American Law and Procedure*, Introduction, section 34. (La Salle Extension University, 1910.)

dealt with mercantile or trade affairs, at first between all merchants, and later only where foreign merchants were concerned. This law was early administered in England by local commercial courts in the port towns and trade centers. By the sixteenth century, however, the rules of the law merchant between domestic traders had been absorbed into the common law system, and by the year 1700 the same thing had happened where the foreign merchant was concerned. The law merchant as a separate system had ceased to exist.

QUESTIONS

1. What are the various meanings given to the words "common law"?
2. Do the federal courts of the United States have a common law?
3. Does each state in the United States have a common law of its own? Is this law different from the common law of another of the states?
4. Who was the Chancellor? What, originally, was his relation to the common law courts?
5. What were the causes which brought about the development of the courts of chancery?
6. What were the social and industrial happenings in England at or about the time that these courts began to develop? Do you suppose that these happenings had anything to do with the origin and development of the chancery courts?
7. In what cases, typically, did the chancellor afford relief?
8. D is threatening to cut down one of P's fine shade trees. What relief could a suitor get in a court of common law? In a court of chancery?
9. D covenants to convey a manor to P. When the day set for performance comes, D refuses to execute the conveyance. What relief could P get in a court of common law? In a court of equity?
10. In the administration of justice, what great advantage did the chancellor have over the common law judges?
11. Do courts of chancery still exist? Are they still unbound by precedents as they were originally?
12. What was the canon court? Admiralty court? With what did the law merchant deal? In what courts was the law merchant originally enforced?

4. Enforcement of Rights

a) Forms of Actions

A[1]

Every civil proceeding in a Common Law court is known as an action. They were of three general kinds: real actions, which pertained

[1] Taken by permission from John E. Townes, *Elementary Law* (2d ed.), pp. 454–55. (T. H. Flood & Co., Chicago, 1911.)

exclusively to land and estates and personal property; and mixed actions, which involved both recovery of real property and damage done to it. These several classes, or rather, the first and second, were subdivided into numerous different classes, each having its appropriate name and peculiar method of procedure.

The principal real actions were the writ of right, the writ of right of dower, and the writ of *quare impedit*. These were so complicated and technical, when in use, as to make their study tedious, and, as they have long been superseded by more rational processes, need not be further considered.

Personal actions were divided into those arising *ex contractu*, that is, from breach of contract; and those arising *ex delicto*, that is, from wrong not a mere breach of contract. Each of these classes was again subdivided. Those *ex contractu* into assumpsit, debt, and covenant; and those *ex delicto* into trespass, trespass on the case, trover and conversion, and replevin, with the action of detinue sometimes classed in the one and sometimes in the other.

B[1]

It has already been noticed, as one of the reasons for the development of the court of chancery in England, that relief in the common-law courts could not be had unless the suitor's claim was of such a nature that the writs in common use would cover it. In other words, it must fall within one or the other of the actions which were allowed. While the scope of these actions is much wider at present than it was at that time, by reason of the introduction of new forms of action, yet the general principle still holds true, in the common-law practice, that a case must be in the form of one of the actions above mentioned, or relief cannot be granted.

C[2]

The legal acceptation of debt is a sum of money due by certain and express agreement; as, by a bond for a determinate sum; a bill or note; a special bargain; or a rent reserved on a lease; where the quantity is fixed and specific, and does not depend upon any subsequent valuation to settle it. The non-payment of these is an injury for which the proper remedy is by action of debt, to compel the performance

[1] Taken by permission from Walter D. Smith, *Elementary Law*, p. 316. (West Publishing Company, St. Paul, 1896.)

[2] 3 Blackstone, *Commentaries on the Laws of England*, pp. 154-56.

of the contract and recover the specific sum due. This is the shortest and surest remedy; particularly where the debt arises upon a specialty, that is, upon a deed or instrument under seal. So also, if I verbally agree to pay a man a certain price for a certain parcel of goods and fail in the performance, an action of debt lies against me; for this is also a *determinate* contract; but if I agree for no settled price, I am not liable to an action of debt, but a special action on the case, according to the nature of my contract. And indeed actions of debt are now seldom brought but upon special contracts under seal; wherein the sum due is clearly and precisely expressed; for, in case of such an action upon a simple contract, the plaintiff labours under two difficulties. First, the defendant has here the same advantage as in an action of *detinue*, that of waging his law, or purging himself of the debt by oath, if he thinks proper. Secondly, in an action of debt the plaintiff must prove the whole debt he claims, or recover nothing at all. For the debt is one single cause of action, fixed and determined; and which therefore, if the proof varies from the claim, cannot be looked upon as the same contract whereof the performance is sued for. If therefore I bring an action of debt for £30, I am not at liberty to prove a debt of £20 and recover a verdict thereon; any more than if I bring an action of *detinue* for a horse, I can thereby recover an ox. For I fail in the proof of that contract, which my action or complaint has alleged to be specific, express, or determinate. But in an action on the case, on what is called an *indebitatus assumpsit*, which is not brought to compel a specific performance of the contract, but to recover damages for its non-performance, the implied *assumpsit*, and consequently the damages for the breach of it, are in their nature indeterminate; and will therefore adapt and proportion themselves to the truth of the case which shall be proved, without being confined to the precise demand stated in the declaration. For if *any* debt be proved, however less than the sum demanded, the law will raise a promise *pro tanto*, and the damages will of course be proportioned to the actual debt. So that I may declare that the defendant, being indebted to me in £30 *undertook* or promised to pay it, but failed; and lay my damages arising from such failure at what sum I please; and the jury will, according to the nature of my proof, allow me either the whole damages, or any inferior sum. And, even in actions of debt, where the contract is proved or admitted if the defendant can show that he has discharged any part of it, the plaintiff shall recover the residue.

D[1]

A promise is in the nature of a verbal covenant, and wants nothing but the solemnity of writing and sealing to make it absolutely the same. If therefore it be to do any explicit act, it is an express contract, as much as any covenant; and the breach of it is an equal injury. The remedy indeed is not exactly the same; since, instead of an action of covenant there only lies an action upon the case, for what is called *assumpsit* or undertaking of the defendant; the failure of performing which is the wrong or injury done to the plaintiff, the damages whereof a jury are to estimate and settle. And if a builder promises, undertakes, or assumes to Caius, that he will build and cover his house within a time limited, and fails to do it, Caius has an action on the case against the builder, for this breach of his express promise, undertaking, or *assumpsit*, and shall recover a pecuniary satisfaction for the injury sustained by such delay. So also in the case before mentioned of a debt by simple contract, if the debtor promises to pay it and does not, this breach of promise entitled the creditor to his action on the case, instead of being driven to an action of debt. Thus, likewise a promissory note or note of hand not under seal, to pay money at a day certain, is an express *assumpsit;* and the payee at common law, or by custom and act of parliament the indorsee, may recover the value of the note in damages, if it remains unpaid.

If I employ a person to transact my business for me, or perform any work, the law implies that I undertook or assumed to pay him so much as his labour deserved. And if I neglect to make him amends, he has remedy for this injury by bringing his action on the case upon this implied *assumpsit;* wherein he is at liberty to suggest that I promised to pay him so much as he reasonably deserved, and then to aver that his trouble was really worth such a particular sum, which the defendant has omitted to pay. But this valuation of his trouble is submitted to the determination of a jury; who will assess such a sum in damages as they think he really merited. This is called an *assumpsit* on a *quantum meruit.*

There is also an implied *assumpsit* on a *quantum valebat,* which is very similar to the former, being only where one takes up goods or wares of a tradesman, without expressly agreeing for the price. There the law concludes, that both parties did intentionally agree

[1] 3 Blackstone, *Commentaries on the Laws of England*, pp. 157–63.

that the real value of the goods should be paid; and an action on the case may be brought accordingly, if the vendee refuses to pay that value.

A third species of implied *assumpsits* is when one has had and received money belonging to another, without any valuable consideration given on the receiver's part; for the law construes this to be money had and received for the use of the owner only; and implies that the person so receiving promised and undertook to account for it to the true proprietor. And, if he unjustly detains it, an action on the case lies against him for the breach of such implied promise and undertaking; and he will be made to repay the owner in damages, equivalent to what he has detained in violation of his promise. This is a very extensive and beneficial remedy, applicable to almost every case where the defendant has received money which *ex aequo et bono* he ought to refund. It lies for money paid by mistake, or on a consideration which happens to fail, or through imposition, extortion, or oppression, or where any undue advantage is taken of the plaintiff's situation.

Where a person has laid out and expended his own money for the use of another, at his request, the law implies a promise of repayment, and an action will lie on this *assumpsit*.

Likewise, fifthly, upon a stated account between two merchants, or other persons, the law implies that he against whom the balance appears has engaged to pay it to the other; though there be not any actual promise. And for this implication it is frequent for actions on the case to be brought, declaring that the plaintiff and defendant had settled their accounts together, *nisi mul computassent* (which gives name to this specie of *assumpsit*), and that the defendant engaged to pay the plaintiff the balance, but has since neglected to do it. But if no account has been made up, then the legal remedy is by bringing a writ to *account, de computo;* commanding the defendant to render a just account to the plaintiff, or show the court good cause to the contrary. In this action, if the plaintiff succeeds, there are two judgments: the first is, that the defendant do account (*quod computet*) before auditors appointed by the court; and, when such amount is finished, then the second judgment is, that he do pay the plaintiff so much as he is found in arrear. This action, by the old common law, lay only against the parties themselves, and not their executors; because matters of account rested solely on their own knowledge. But this defect, after many fruitless attempts in parliament, was at

last remedied by statute 4 Ann. c. 16 which gives an action of account against the executors and administrators. But, however, it is found by experience, that the most ready and effectual way to settle these matters of account is by bill in a court of equity, where a discovery may be had on the defendant's oath, without relying merely on the evidence which the plaintiff may be able to produce. Wherefore actions of account to compel a man to bring in and settle his accounts, are now very seldom used; though when an account is once stated, nothing is more common than an action upon the implied *assumpsit* to pay the balance.

E[1]

Personal actions are divided into contract actions and tort actions. The names of the common contract actions are debt, covenant, special assumpsit, and general assumpsit. Actual contracts, contracts really made by the parties and not mere obligations created by law, are either sealed contracts or simple contracts. Covenant is never used except when the suit is on a sealed contract (*Ludlum* v. *Wood*, 2 N. J. L. 52). The two forms of assumpsit, on the other hand, can be used only if the suit is on a simple contract (*Johnston* v. *Salisbury*, 61 Ill. 316). Debt, curiously, may be used to recover on either kind of contract (*Smith* v. *Meetinghouse*, 23 Pick. 177). This would mean that covenant and assumpsit are exclusive of each other and debt covers the ground of both. But there are limits on the scope of debt which prevent any such broad statement. Debt will not lie on a sealed contract, unless the suit is for some definite sum of money (*Fox River Co.* v. *Reeves*, 68 Ill. 403). Thus, if the suit is for damages for breach of a sealed contract, covenant alone would lie. Originally, it was only for indefinite sums that covenant would lie. So once covenant and debt were exclusive of each other. But finally, the judges permitted covenant to be used (that is the action of covenant, the form of proceeding called covenant); even when the sum sued for was a liquidated amount (*March* v. *Freeman*, 3 Levinz, 383). This change made covenant and debt overlap, in the case of suits on sealed contracts for definite amounts.

Now debt on a specialty (sealed contract) was really a separate form of action from debt on simple contract. The pleadings in these two forms of debt were different. The limitation on debt on simple

[1] Taken by permission from C. B. Whittier, 11 *American Law and Procedure*, Pleading, pp. 177–78. (La Salle Extension University, 1913.)

contract was that it would only lie, where the plaintiff is suing for the price of some thing or some service which the plaintiff has given to or for the defendant. Thus, here also, as well as in the case of debt on a specialty, debt will not lie for damages (*Deberry* v. *Darnell*, 13 Yerg. [Tenn.] 451). Special assumpsit is the form of action to recover damages for breach of a simple contract (*Drury* v. *Merrill*, 20 R. I. 2). General assumpsit is concurrent with debt on simple contract (*Hickman* v. *Searcy*, 17 Yerg. [Tenn.] 47). Special assumpsit also is concurrent with debt on simple contract. Let us summarize this. To recover damages on a sealed instrument, covenant is the only action allowed. To recover damages on a simple contract, special assumpsit is the only available action. To recover a definite sum due by a contract under seal, either debt on a specialty or covenant may be used. To recover the price of something, due by a simple contract, the plaintiff may use either debt on simple contract, general assumpsit, or special assumpsit. The complicated history by which these forms of action were developed, and came to overlap each other to the extent just stated, is beyond our present purposes.

F[1]

Deprivation of possession may also be by an unjust *detainer* of another's goods, though the original taking was lawful. As if I distrain another's cattle, damage-feasant, and before they are impounded he tenders me sufficient amends; now, though the original taking was lawful, my subsequent detainment of them after tender of amends is wrongful, and he shall have an action of *replevin* against me to recover them; in which he shall recover damages only for the detention and not for the *caption*, because the original taking was lawful. Or, if I lend a man a horse, and he afterwards refuses to restore it, this injury consists in the detaining, and not in the original taking, and the regular method for me to recover possession is by action of *detinue*. In this action of *detinue*, it is necessary to ascertain the thing detained, in such manner as that it may be specifically known and recovered. Therefore it cannot be brought for money, corn, or the like; for that cannot be known from any other money or corn, unless it be in a bag or a sack, for then it may be distinguishably marked. In order therefore to ground an action of *detinue*, which is only for the *detaining*, these points are necessary: (1) That the defend-

[1] 3 Blackstone, *Commentaries on the Laws of England*, pp. 151–52.

ant came lawfully into possession of the goods, as either by delivery to him or finding them; (2) That the plaintiffs have a property; (3) That the goods themselves be of some value; and, (4) That they be ascertained in point of identity. Upon this the jury, if they find for the plaintiff, assess the respective values of the several parcels detained, and also damages for the detention. And the judgment is conditional; that the plaintiff recover the said goods, or (if they cannot be had) their respective values, and also the damages for detaining them. But there is one disadvantage which attends this action; viz., that the defendant is herein permitted to wage his law, that is, to exculpate himself by oath, and thereby defeat the plaintiff of his remedy; which privilege is grounded on the confidence originally reposed in the bailee by the bailor, in the borrower by the lender, and the like; from whence arose a strong presumptive evidence, that in the plaintiff's own opinion the defendant was worthy of credit. But for this reason the action itself is of late much disused, and has given place to the action of trover.

G

The action of *replevin* is available to a plaintiff, primarily, to recover possession of specific personal property, and, secondarily, to recover damages for its unjust detention. In its original conception it could be used only when the property claimed had been unlawfully taken from the possession of the plaintiff and was being unlawfully detained. In this respect, it is to be contrasted with *detinue*, which was the appropriate action for the recovery of personal property, lawfully received from the plaintiff but unlawfully detained. In most jurisdictions, the action of *replevin* has been extended so that it now comprehends the cases formerly lying exclusively in *detinue* and the action may in such jurisdictions be brought in all cases to recover specific personal property, unlawfully detained, and damages for its detention.

According to the normal procedure for the recovery of personal property in the action of *replevin*, the plaintiff, strangely enough, is entitled to secure possession of the property in controversy before the commencement of his action. The reason for this is to prevent the defendent from putting the property beyond the control of the court pending the outcome of the action. The plaintiff complains to the sheriff that he is the owner of certain personal property and

that it is being unjustly detained by the defendant; the sheriff thereupon takes the property from the defendant and delivers it to the plaintiff. The plaintiff must file with the sheriff, at the time that he makes his complaint, a bond with responsible sureties, binding him to prosecute his action with reasonable diligence and to return the property to the defendant in case the court should order him to do so. The purpose of this bond is to protect the defendant, who may be able to establish in the trial of the controversy that he is entitled to the property as against the plaintiff.

H[1]

This action of *trover* and *conversion* was in its original an action of trespass upon the case, for recovery of damages against such person as had found another's goods, and refused to deliver them on demand, but converted them to his own use; from which finding and converting it is called an action of *trover* and *conversion*. The freedom of this action from wager of law, and the less degree of certainty requisite in describing the goods gave it so considerable an advantage over the action of *detinue*, that by fiction of law actions of *trover* were at length permitted to be brought against any man who had in his possession by any means whatsoever the personal goods of another, and sold them or used them without the consent of the owner, or refused to deliver them when demanded. The injury lies in the conversion: for any man may take the goods of another into possession, if he finds them; but no finder is allowed to acquire a property therein unless the owner be forever unknown; and therefore he must not convert them to his own use, which the law presumes him to do, if he refused them to the owner; for which reason such refusal also is, *prima facie*, sufficient evidence of conversion. The fact of the finding, or *trover*, is therefore now totally immaterial; for the plaintiff needs only to suggest (as words of form) that he lost such goods and that the defendant found them; and if he proves that the goods are *his* property and that the defendant had them in his possession, it is sufficient. But a conversion must be fully proved; and then in this action the plaintiff shall recover damages, equal to the value of the converted, but not the thing itself; which nothing will recover but an action of *detinue* or *replevin*.

[1] 3 Blackstone, *Commentaries on the Laws of England*, pp. 152–53.

I[1]

A trespass may be committed either upon the person of another, as in the case of assault, assault and battery, or false arrest or imprisonment; or upon his real and personal property, as where a person goes on another's land, or takes or merely injures his goods; or upon his relative rights, as where a person beats or debauches another's daughter or servant. Where the injury complained of is the entry upon real property, the action is called "*trespass quare clausum fregit.*" Where the injury is the taking and carrying away of personal property, it is called "*trespass de bonis asportatis.*" Where the injury is the loss of services, as in an action by a father or master of enticing away or debauching his daughter or servant, it is called "*trespass per quod servitium amisit.*" All trespasses, whether committed with actual or implied force, are called "*trespass vi et armis.*"

Where such an injury as we have described is committed with force, actual or implied, and the injury is immediate, and not consequential; and, in the case of injury to property, the property was in the possession of the person complaining at the time of the injury—the proper remedy to recover damages for the injury is by action of trespass. But, if, on the other hand, a tort is committed without force either actual or implied, or the injury was merely consequential, or if, in the case of injury to property, the plaintiff's interest or right was only in reversion at the time of the injury, trespass will not lie and the remedy, as we shall presently see more at length, must be by an action on the case or trover.

Force is either actual or implied. An assault and battery, tearing down a fence and entering upon land, or breaking into a house, or carrying away goods, are examples of actual force; and in these cases there is no difficulty in determining that trespass is the proper remedy for the immediate injury resulting from the wrong, if, of course, in the case of the injury to property, real or personal, the plaintiff was in actual or constructive possession.

In many cases where it is clear that there was no actual force, the law will imply force, and the effect will be the same as if there had been actual force, in so far as regards the form of action.

Force is implied in every *trespass quare clausum fregit.* If a man goes upon another's land without right, however peaceably or thoughtlessly, the law will imply force, and trespass will lie. And the same is

[1] Taken by permission from Benjamin J. Shipman, *Common Law Pleading* (2d ed.), pp. 50–54, 56–59. (West Publishing Company, St. Paul, 1895.)

true if a man's cattle are driven or stray upon another's land and cause injury. Force is also implied in every false imprisonment, and trespass will lie therefore, though there may have been no actual violence, nor even a touching of the person imprisoned.

If a man's wife, daughter, or servant is assaulted, beaten, or imprisoned, there is a forcible injury to the man's relative rights, for which he may maintain trespass. Where a wife, daughter, or servant is enticed away, or seduced or debauched, even with his or her consent, the law implies force, and the husband, father, or master may maintain trespass against the wrongdoer.

If a fire is started, and, as an immediate consequence, the property of another is destroyed, there is constructive force, and trespass will lie.

Generally, a mere nonfeasance cannot support an action of trespass, for in the absence of an act there can be no force. Trespass, therefore, will not lie for the mere detention of goods, where there has been no unlawful taking; nor for neglect to repair the bank of a stream, whereby another's land was overflowed; nor for neglect to repair a fence, whereby another's animal escaped onto the land of the person so negligent or elsewhere, and was injured.

As a rule, a master is not liable in trespass for injuries caused by the negligence or want of skill of his servant, or by his unauthorized act; but must be sued in case, if at all, even though the servant might be liable in trespass. If the injury occurs, however, as the natural and probable consequence of an act of the servant ordered expressly or impliedly by his master, and the act was forcible, and the injury immediate, trespass will lie against the master.

The degree of violence with which the wrongful act was done is altogether immaterial in so far as regards the form of action. If a log is put down on a man's foot in the most quiet way, the action must be trespass; but if it is thrown into the road, with whatever violence, and a person afterwards falls over it, the action must be case and not trespass.

To sustain trespass the injury must have been immediate, and not merely consequential. For consequential injuries, even though there may have been force, the remedy is by action on the case, and not trespass. An injury is considered as immediate when the act complained of itself, and not merely a consequence of that act, occasioned it. But where the damage or injury ensued, not directly from the act complained of, it is consequential or mediate, and trespass will not lie.

If a person in the act of throwing a log into the highway hits and injures a passer-by, the injury is immediate upon the wrongful act, and trespass will lie; but if, after a log has been wrongfully thrown into the highway, a passerby falls over it, trespass will not lie.

To constitute an immediate injury committed with force, it is not necessary that the wrongdoer shall have intended to apply the force in the manner in which it caused the injury. If a man puts in motion a force, the natural and probable tendency of which is to cause an injury, he is regarded in law as having forcibly and directly caused that injury. If, for instance, a person lays rubbish so near another's wall that, as a natural consequence, some of it rolls against the wall, the injury is forcible and immediate, and the remedy is in trespass. And where the defendant had ascended in a balloon, which descended a short distance from the place of ascent into the plaintiff's garden, and the defendant, being entangled and in a perilous position, called for help, and a crowd of people broke through the fences into the garden and trampled down the vegetables, it was held that, though ascending in a balloon was not an unlawful act, yet, as the defendant, under the circumstances, would ordinarily and naturally draw the crowd into the garden, whether from a desire to assist him, or to gratify a curiosity which he had excited, he was answerable in trespass for all the damage done to the garden. And where a person makes an excavation so near his neighbor's land that the land, from its own weight and of necessity, falls, trespass will lie. And where a person through negligent and careless driving, though not willfully, causes his vehicle to forcibly strike another vehicle or a person, the person injured need not bring an action on the case, though, by the weight of authority, such an action is also maintainable, but may sue in trespass. The same is true where a collision between vessels is caused by carelessness or unskillfulness in navigation. And, generally by the weight of authority, where there is an immediate and forcible injury to person or property attributable to the negligence of another, the party injured may at his election treat the negligence of the wrongdoer as the cause of action and declare in case, or consider the act itself as the injury and declare in trespass. Some of the courts, however, hold that where the injury from a negligent act is both forcible and immediate, case will not lie, and that trespass is the only remedy.

So, if a wild or vicious beast, or other dangerous thing, is turned loose or put in motion, and mischief immediately ensues to the person

or property of another, the injury is regarded as immediate and as committed with force, and trespass is the proper remedy.

In a leading case often cited the defendant had thrown a lighted squib in a market place, and, being thrown about by others in self-defense, it ultimately injured the plaintiff. The injury was held to have been immediately and forcibly inflicted by the defendant, the new direction and new force given to the squib by the other bystanders not being a new trespass, but merely a continuation of the original force.

In another case, in which the question of immediate or consequential injury is considered, the defendant had seized the plaintiff by the arm and swung him violently around and let him go, and the plaintiff, becoming dizzy, had involuntarily passed rapidly in the direction of a third person and come violently in contact with him, whereupon the latter pushed him away, and he came in contact with a hook, and was injured. It was held that trespass was the proper remedy.

Where a person commits a forcible and wrongful act, the natural or probable consequence of which is to frighten the horses of another and cause them to run away, and such a consequence results, he is liable in trespass for the injury. If he did not know, and should not reasonably have known, of the proximity of the horses, or if, though he did know this, it was not natural or probable that his act would frighten them, trespass would not lie, but the action would have to be case.

If a man starts a fire, and, as an immediate consequence, the property of another is destroyed by it, trespass is a proper remedy for the injury.

If a person pours water directly upon another's person or land, it is clear that the injury is immediate, and that trespass is the remedy. But if a person stops a water course on his own land, whereby it is prevented from flowing as usual, or if he places a spout on his own building, and in consequence thereof the water afterwards runs therefrom upon another's land or person, the injury is consequential, and trespass will not lie.

J[1]

The form of action known as *Case*, in its comprehensive form, probably had its origin in a statute which was enacted in the time of Edward the First (1285 A.D.), and in which it was provided:

[1] Taken by permission from John J. McKelvey, *Common Law Pleading* (2d ed.), pp. 58–61. (Baker, Voorhis & Co., 45–47 John St., New York, 1917.)

And whensoever from hence forth it shall fortune in the Chancery that in one Case a Writ is found and in like Case falling under like Law and requiring like Remedy, is found none, the Clerks of the Chancery shall agree in making the Writ; or the Plaintiffs may adjourn it until the next Parliament, and let the Case be written in which they cannot agree, and let them refer themselves until the next Parliament, by Consent of men learned in the Law, a Writ shall be made, lest it might happen after that the Court should long time fail to minister Justice unto Complainants.

The intent of the statute was to allow the statement of any cause of action, for which there was no existing form, according to the facts in the particular case, thus furnishing a means for recovery in all cases where there was a wrong, but no established form or *writ* in which to sue.

Undoubtedly before this statute, actions were allowed which were of the nature afterward known as Actions upon the Case (*Kinneyside* v. *Thornton*, 2 Blackstone Rep. 1113; *Brotherton* v. *Wood*, 3 B. & B. 62, 63). Several actions of this sort are found among the Select Civil Pleas published by the Selden Society (Selden Society Publications, Vol. III. Select Civil Pleas, Cases 7, 84, 106), and show conclusively that the principle of framing new writs for new cases which, though the statute cited, subsequently produced the comprehensive action of Case, was not unknown to the common law.

The tendency toward crystallization into set forms was strong enough to evolve two new and distinct forms from the general class, and, as we have seen, it was not long before the actions of *Assumpsit* and *Trover* were recognized as separate actions.

There was, however, a large general class of actions left, actions of so varied a character as to the facts upon which they were based, that they could not well be brought within any one or more forms. These are the actions which have, since the branching off of the Assumpsit and Trover, constituted the class of actions known as *Case*.

Without attempting to specify the numerous instances where the action of Case is applicable, it may be said that it concludes all actions for damages for wrongful acts which do not fall within any of the other classes of actions, and that the wrongful acts are usually indirect or somewhat remote from the injuries resulting therefrom. It is to be noted, too, that the wrongful acts are always violations of natural rights, and never of rights which arise from contract or other special relations.

K[1]

Today, in the common law states, the forms of action to recover land, with or without damages are ejectment, trespass to try title (purely statutory and confined to Texas), writ of entry (an old real action surviving in Massachusetts, Maine, and New Hampshire, but in a greatly modernized form), and forcible entry and detainer. Trespass to try title is the Texas form of ejectment (*Hays* v. *Railway*, 62 Texas 397). Writ of entry is the substitute for ejectment in the three states where it is used (*Smith* v. *Wiggin*, 48 N.H. 105). So what we really have is a summary proceeding to obtain possession of realty wrongfully entered upon or wrongfully detained. The word "forcible" is a survival of the time when the action was criminal in its nature, and actual force on the part of the defendant had to be proved in order to maintain the action. Today the action is civil, and generally actual force is unnecessary. Indeed, the most common use of the action is made by landlords in regaining possession from tenants, who wrongfully fail to give up possession when their leases have expired. The forms of proceeding in this action are wholly governed by local statutes, and a discussion of these would throw little light on the nature of common law pleading.

The pleadings in an action of ejectment are very simple, but they have an exceedingly interesting history. They are also very instructive in illustrating how the law, in its earlier history, grew by the adoption of fictions. We may therefore give them some attention. Ejectment was originally an action by a lessee of land to recover damages against one who had ejected him from the land. At first it resulted only in a recovery of damages. But equity took jurisdiction to put the lessee back in possession. This led the common law courts, jealous of the growing jurisdiction of equity, also to order the sheriff to put the lessee back in possession. So the lessee in an action of ejectment, if he succeeded, recovered back his possession, and obtained damages for the wrongful interference with it. When it became apparent that the real actions were too dilatory and expensive for continued use, the lawyers and courts hit upon the expedient of using the action of ejectment to try title to land.

Suppose D is in possession of land that C claims. C would take possession of the land surreptitiously, and then make a lease of it to

[1] Taken by permission from C. B. Whittier, 11 *American Law and Procedure*, Pleading, pp. 167–70. (La Salle Extension University, 1913.)

T. T would then take possession. When D discovered T in possession, he naturally would eject him. Then T would bring an action of ejectment against D for ousting him. The parties to this action would be T, on the demise of C v. D. "On the demise of" meaning, of course, under a lease from C (see Doe dem. Evans v. Row, 2 Ad. & E. 11). In this action T, in his declaration, would allege (1) that C has title, (2) that C leased to T, (3) that T entered into possession, and (4) that D ejected him. Obviously the second, third, and fourth allegations were plainly provable and the only possible real contest was over the first. Thus, the question was raised whether C really had title as against D. If T proved C's title he was put into possession by order of court, and he, then, immediately surrendered to C. Thus C recovered the land against D.

The unpleasantness of an actual ouster of T by D was avoided by the introduction of the so-called "casual ejector." After the lease to T and his entry into possession, E, the casual ejector, some person selected of course by C, entered and put T off the land. T would then sue E in ejectment. But plainly it would not be fair to D to let T obtain the possession by merely recovering of E. So it was held, when suit was brought by T against E, notice of the suit must be given D that he might have an opportunity to defend it. If he did not come in and defend, then to order him dispossessed by the sheriff in favor of T would be fair enough. Finally, it was decided that there was no use in going through the farce of a lease by C to T, an entry by T, and an ouster by E. It was held that, if D wished to defend the case, he would have to consent to admit the lease, entry and ouster, and simply deny C's title. This was called the "consent rule." T would bring his action, making the same allegations as above, and would sue the casual ejector. Notice would be given to D. D would be admitted to defend, on his consenting to deny C's title alone. Thus the lease, the entry, the ouster, and the casual ejector all became fictions. The name John Doe came to be generally used for the fictitious tenant, and the name Richard Roe for the fictitious casual ejector.

QUESTIONS

1. What is meant by a "form of action"? What is its function? How are forms of actions classified? Which existed first, rights or forms of action?
2. What was the scope of the action of covenant? Is it still available to a suitor as a form of action? If not, what form or forms of action have taken its place?

3. What was the scope of the action of debt? Is it still available to a suitor? If not, what form or forms of action have taken its place?
4. What was the scope of the action of detinue? What form of action has taken its place?
5. What is meant by the statement that in the actions of detinue and debt the defendant could "wage his law"?
6. Briefly trace the development of the action of assumpsit. What is the difference between general and special assumpsit? What is meant by a count in *quantum meruit?* A count in *quantum valebat?* What is meant by *indebitatus assumpsit?*
7. D executes to P a promise under seal to pay the latter $500 at a future day. In what action will P sue D in case D does not pay the $500 on the day promised?
8. H is the holder of a bill of exchange, drawn upon and accepted by A. A fails to pay the bill at its maturity. In what action will H sue A on the bill?
9. P entered into an agreement with D by which he agreed to perform certain services for D in consideration of D's promise to pay him $300. P has performed the services in question. What action or actions may P bring against D for breach of the latter's promise?
10. In the foregoing case, before the day set for beginning performance of the services, D notified P that he did not want P to perform. What action will P bring for the breach of the promise?
11. D requests P to perform certain services for him. Nothing is said between them about the amount of the compensation to which P will be entitled. Assuming that P has performed the services and that he is legally entitled to compensation, what is the proper form of action in which to sue D?
12. P sold a horse to D for $300, the purchase price to be paid within thirty days. D does not pay the $300 within the time agreed. In what action may P sue D for his failure to perform his promise?
13. P, by mistake, pays D $10 too much in the settlement of an account. Assuming that P is entitled to recover the money, in what form of action will he sue?
14. D steals $100 from P. In what form of action may P sue D to get redress for the conduct of D?
15. What is the scope of the action of replevin? What allegations must the plaintiff make and prove in order to recover in this action? What does the plaintiff recover in an action of replevin?
16. What is the scope of the action of trover? What allegations must the plaintiff make and prove in order to recover in this action? What does the plaintiff recover in an action of trover?

17. D takes possession of P's horse without the latter's consent and refuses to return it. What action or actions may P bring against D for redress of the wrong?
18. P permits D to have possession of the horse for ten days. At the end of ten days D refuses to return the horse at the request of P. What action or actions may P bring because of the wrong of D?
19. What is the scope of the action of trespass? What is the difference between the action of trespass and the action of case or trespass on the case? Explain how the action of case or trespass on the case arose.
20. D walks upon the land of P without the consent of the latter. Assuming that this is a wrong against P, what action will he bring against D for redress?
21. D beats P's horse without justification. Assuming that this is an actionable wrong, what action will P bring against D?
22. D leaves a wheel-barrow in a much frequented path. P, passing along the path after dark, stumbles over it and is seriously injured. Assuming that D's conduct is an actionable wrong against P, what action will the latter bring for redress?
23. Suppose that D left the wheel-barrow in the path for the very purpose of injuring P, what form of action, other than the one mentioned, may P bring against D?
24. P loans his horse to X. D negligently injures the animal while it is in possession of X. (*a*) Assuming that this is a wrong against X, what action will he bring against D? (*b*) Assuming that it is a wrong against P, what action will he bring against D?
25. What is the difference between direct injuries and indirect injuries? What is the proper action to bring for the redress of a direct injury? What is the proper action to bring for the redress of an indirect injury?
26. What forms of action are available for the recovery of possession of land?
27. Trace the development of the action of ejectment.

b) Jurisdiction

A

BY EDWARD W. HINTON

Under the early Norman theory, the superior courts did not have power and authority to deal with cases generally, but only with such cases as were turned over to them by the king's writ. This theory made the original writ necessarily the first step in an action. The original writ issued as a matter of right from the chancellor's office, on a formal written application known as a *praecipe*. In substance, it commanded the sheriff to summon the defendant, or arrest him as the case might be, to answer the plaintiff's complaint, which it briefly

recited, before the proper court on a specified day. Under the authority of this writ the sheriff summoned the defendant by delivering a copy of the writ to him, or arrested and brought him before the court. In case the defendant was summoned merely, he could delay the proceedings by failing to appear, since it was also the theory that the court could not proceed without the presence of the parties before it. If a defendant, when summoned, failed to appear, the plaintiff could have his property attached to compel him to appear, or could apply for another writ to have him arrested. In one way or the other, the defendant was thus gotten before the court. When the defendant appeared, either voluntarily or in obedience to the summons or by compulsion, the court was in a position to proceed with the controversy. At this stage of the case the defendant might object to the formal sufficiency of the writ or to the manner of its service and thus delay proceedings until a proper writ was obtained or the writ was properly served. By comparatively late English statutes, a writ was substituted for the various original writs formerly in use.

B[1]

As stated above, it is in the courts that rights and duties between men are established and enforced, when any dispute arises as to the existence of a duty or when the party who owes the duty is derelict in its performance. The courts are a part of the governmental machinery established by the people to administer justice between them. The law creates them, and it is from the law that their powers are derived. These powers may be defined in the constitution or in the statutes, more commonly in the latter. For convenience and general efficiency some courts are given one class of litigation and others another. This classification is usually made by statute. Thus, one court may be devoted entirely to the administration of the estates of deceased persons; ordinarily such a court is known as the probate or surrogate's court. Another court may be created to try criminal cases and none other. A third court may be established to have exclusive power to hear and determine all disputed matters involving the principles of equity, and so on. Any discussion of the question, which court has the authority to determine a particular controversy or to hear a certain case, involves a problem of the court's jurisdiction of the subject matter. It is because courts are limited

[1] Taken by permission from F. W. Henicksman, 11 *American Law and Procedure*, Practice, pp. 323–34. (La Salle Extension University, 1913.)

in their powers and because the capacities to adjudicate matters in controversy are specifically defined, that such questions are of importance in the law of Practice.

Entirely distinct from the power of the court, under the law of its organization, to hear a certain controversy is the question, whether the parties to the controversy have come or been brought before the court. It is fundamental that the power of a court to pass upon a plaintiff's rights depends upon whether he has himself submitted the matter upon which the court has power to pass. The court cannot arbitrarily pass upon his case without his request to have it do so. On the other hand, if a party invokes the aid of a court, it can only proceed to a proper adjudication in the event that it gets jurisdiction of the person of the defendant to the controversy. He may come into court voluntarily. If so, there is no further question as to jurisdiction over him. If he does voluntarily submit, it is essential to the determination of his rights that he be brought into court. A discussion of the jurisdiction of the subject matter and of the parties follows.

As stated at the outset, in order to have an effective determination of a controversy, it must be submitted to a court that has power to hear and determine it. If it does not belong to the class of cases the court has power to hear, such power cannot be assumed by the court itself, nor created by the voluntary action of the parties to the suit in consenting to permit the court to determine the controversy. The people have placed limits upon the court's power and neither it nor the litigants can change them. If a court usurps the function of another court its decision is null and void. Its power, if exercised at all, must be exercised within the field over which it was given jurisdiction by the law. Whenever it goes beyond that, its determination is a nullity.

Thus in a certain case (*People* v. *Seelye*, 146 Ill. 189), a probate court had power over the administration of estates of infant wards by guardians. The guardian had given a bond, which would be violated if he did not properly account for all the money or property the probate court found he was obliged to account for. The probate court, in settling the accounts, specified that the guardian was liable for certain money belonging to the ward which he received during the ward's minority. It also found that he was accountable to the ward for certain money he had received since the ward's minority. The guardian was unable to pay either of the sums, and an action was

brought on his bond. The bondsman claimed that the determination of the probate court that the guardian owed the ward for money received on his behalf after his minority was null and void. The basis of his contention rested on the point that the probate court had no power to pass upon matters not involving the rights and duties of guardian and ward, and that the matter of the guardian's duty to account for money received from the ward's property, after his majority, could only be passed upon in some other court, it not involving the relations of guardian and ward. The court so held, and decided that the bondsman was liable only on such part of the probate court's settlement as it had power to make.

However convenient it may be to have a court, near the place where the parties reside and to which they have by agreement brought their controversy, pass upon it, such considerations can have no effect on the court's jurisdiction of the subject matter. Thus, in *Dudley v. Mayhew* (3 N.Y. 9) a bill was filed in a state court to restrain the infringement of a patent. Federal courts are the only courts that have power to pass upon controversies arising out of patent rights. The defendant at first pleaded that the state court had no jurisdiction of patent cases. Later he agreed, for a valuable consideration, not to raise the point. When a decree was rendered against him, however, he appealed the case and raised the question of jurisdiction. The court held that the United States Constitution and the Federal statutes had conferred exclusive jurisdiction in patent cases upon the Federal courts, that state courts have no jurisdiction in patent cases, that jurisdiction could not be conferred by the consent of the parties, and that the consent of the defendant, although in the nature of a contract for a valuable consideration, could not confer jurisdiction upon the court to render a valid decree.

The question of the proper jurisdiction of the subject matter is of the utmost importance in litigation. An error in that regard is far reaching, as it nullifies all the proceedings taken by the court. Unlike many other questions, it may be raised at any time by the defendant while the case is pending in the trial court. The court may of its own motion dismiss a case at any time for lack of power to pass upon it. But the parties are not limited to the lower court's action upon a motion to dismiss a case for want of jurisdiction. It may be that the lower court made no ruling upon the question at all. This does not prevent the defendant from raising it for the first time in a reviewing court. The question of jurisdiction, unlike other questions of

practice, can be raised in an upper court without having been raised in the trial court. Thus, in the case of *Aurora* v. *Schoeberlein* (230 Ill. 496), the court, after stating that the question of jurisdiction of the subject matter need not be raised in the lower court, in order to take advantage of the point on appeal, held that the trial court had no jurisdiction of the case. It is a matter of practice that cannot be waived, either by express action or consent of parties, or by failure to act or to request a lower court to act upon it.

As a usual thing there can be little difficulty with reference to the jurisdiction of the court over the person of the plaintiff. He comes voluntarily into court and asks its assistance in his behalf. When he has done this the court has jurisdiction of his person, and no further question can arise with reference to it. Cases have arisen, however, where the jurisdiction of the court over the person of the plaintiff was not procured, and where the judgment of the lower court was refused merely because such jurisdiction had not been procured. Thus, in *Bell* v. *Farwell* (189 Ill. 414) writ was brought by attorneys in the name of Bell against Farwell. After the case had been in court for several years, Farwell discovered that Bell had not authorized the bringing of the suit and that he was entirely ignorant of its having been done. This fact was properly shown to the court with a request to dismiss the suit. The request was resisted on the ground that Bell was only a nominal plaintiff, and that he had assigned the claim to another in whose behalf the suit was being prosecuted in Bell's name. No showing was made, however, that the assignee of the claim had authorized the suit to be brought. The court held that as Bell had not authorized the bringing of the suit, nor the assignee who was entitled in law to use Bell's name, it must be dismissed.

After a venue of a case has been properly ascertained, and the suit commenced in the proper court by the appearance of the plaintiff upon a request for the assistance of the court, it is then in a position to proceed further with its duties as a tribunal of justice. The next proper step to be taken is to procure jurisdiction over the person of the defendant. This is essential as proper notice to him in some form of service must be given before a binding judgment can be entered against him. In *Greenman* v. *Harfey* (53 Ill. 386) a widow brought suit to have dower in certain lands, in which a minor defendant had an interest, assigned to her. The widow's dower was assigned, after the minor's guardian had appeared in court on her behalf without

service of process being had upon her. The supreme court reversed the decree of the lower court assigning dower, saying: "As owner of one-half the fee at law, she (the minor) was a necessary party, that, on final hearing, her interests and rights should be passed upon and determined. Not having been brought before the court, she is not bound by the decree, and may, in future, contest the right of the widow to dower as though this proceeding had never been instituted. Nor does the minor become a ward of the court until she is served either by summons or by publication. The court assumed no jurisdiction over the minor in this case." It is thus seen that only after service of process is had upon a defendant, who can become a party to a suit only by such service, can a court, that has jurisdiction of the subject matter, proceed to give a binding judgment.

A defendant is unwilling, as a rule, to be made a party to litigation of any kind. To make him a party against his will must be notified. The notice is given him in most cases by serving him with process. This is usually the initial step to be taken by the plaintiff, directly against the defendant, in the course of the determination of the rights and duties between him and the defendant. It is the first point at which the defendant may strike to defeat the particular suit. Defendants have taken occasion to test the service of process upon them in many suits, and well defined rules of practice have grown up with reference to the proper service of process. We shall examine somewhat at length these rules of practice whereby the court obtains jurisdiction of the person of the defendant. In the course of the discussion of the various phases of the service of process, it should be carefully borne in mind that the entire subject is directly related to the subject of the jurisdiction of the courts, a fundamental matter in all litigation and absolutely essential to procure a valid judgment.

From what has been stated, it may be seen, that the defendant is bound by what a court does, in a case to which he is a party, only in the event that he has been notified of the proceeding. The form and requisites of such notice are material. The method of serving the notice varies with varying circumstances, chiefly depending upon whether the defendant is a resident of the state or a non-resident. There are also various methods by which to test the sufficiency of the service of process.

The summons is the formal notice to the defendant to appear and defend the action. It should contain a statement of the venue—

the county in which the suit has been brought. As there are usually different courts in the same county, it should state the court in which the suit is pending, and also the place at which the court is sitting for the time being. Where process can be served only by an officer of the county, such as sheriff or coroner, it should be addressed to such officer. In some jurisdictions the plaintiff or his attorney may give a notice to the defendant and bring him into court in that way. Where such a practice prevails, no direction to an officer is necessary. The summons should also contain the names of the parties to the suit, the nature of the cause, and the amount sued for, if a money demand is involved. It is intended by the summons to give notice of when the defendant is required to appear and defend. This is usually the return day and the summons should state it. The clerk of the court issues the summons and it should be signed by him. Furthermore, it should contain the seal of the court.

In some states it is essential that a summons should run in the name of the people of the state. Thus, in *Knott* v. *Pepperdine* (63 Ill. 219) this requirement is shown to exist in the state constitution of Illinois. The court here said:

> It is insisted that the summons in this case is void, because it does not run "In the name of the People of the State of Illinois" as required by the constitution. The writ runs, "The People of the State of Illinois to the Sheriff of Kankakee County." There is no foundation for the objection. The writ does run in conformity with the constitutional requirement.

This requirement, that the summons run in the name of the people, is unnecessary in those states where service may be made by a mere notice. Thus, in Wisconsin, a summons is a mere notice and not process, and it is not necessary that it should run in the name of the people (*Porter* v. *Vandercook*, 11 Wis. 70).

As stated, the summons should state on its face when and where it is returnable. It is thus the party learns when and where it is his duty to be present to answer to the plaintiff's case. When it is to be made returnable by the clerk of the court depends upon the statutory requirements in the different states. It may be made returnable at the next term, or within a certain number of days after the issuance. If made returnable at a proper time, it is the duty of the defendant to appear or he may be defaulted for failure to do so. If, however, the return day is fixed at a time that violated the requirements of law, the defendant need not appear, as the summons is void and service of a void summons is ineffective to give notice.

The summons, where the notice is given by summons, is served by the officer to whom it is addressed. The manner in which he must serve it is prescribed by law and differs in different cases, depending upon the nature of the cause, upon whether the defendant is a natural or artificial person, and upon other circumstances. It is the officer's duty to follow the method prescribed and to make a correct statement thereof on the back of the summons. This is known as the officer's return. On or before the day upon which he is called upon in the face of the summons to return it into court, it is his duty to file it there. From the return of the summons may be ascertained the sufficiency of the service. The word "return" is appropriately applied also to the delivery of the summons to the court. Until so delivered there is no return, although an endorsement of the manner of service may be made on the summons. This endorsement may be changed at any time before it is delivered to the court, but thereafter it can only be changed with the court's permission.

QUESTIONS

1. What is meant by "jurisdiction"? Why is it necessary for the court to have jurisdiction over the parties and subject-matter before it can hear and determine a controversy?
2. Suppose that the court has no jurisdiction over certain subject-matter, can it give a valid judgment in reference to the subject-matter? In such a case, can the parties to the controversy waive the court's lack of jurisdiction?
3. How is jurisdiction over the subject-matter of a controversy acquired?
4. How is jurisdiction over the defendant acquired? Why should it be necessary for the court to have jurisdiction over the defendant in order to give a valid judgment against him?
5. How is jurisdiction over the plaintiff acquired? Can you think of a situation in which a court might not have jurisdiction over the plaintiff?
6. What is the essence of the process by which jurisdiction of the defendant is acquired? Who serves the process on him? What becomes of the paper after it has been served?
7. What is meant by "notice by publication"? Under what circumstances may a defendant be notified of an action against him by publication?
8. P lives in the state of Illinois and has a cause of action against D, who lives in the state of Indiana. How will P get such jurisdiction over him that his cause of action may be tried?
9. Both P and D live in the same county in the state of Illinois. How will P get jurisdiction over D?

10. They live in the state of Illinois, but P lives in one county, and D lives in another. How can jurisdiction over D be gotten?
11. Both live in the same state, but D conceals himself so that process cannot be served upon him. What may P do under the circumstances?
12. Both live in the same state, but D leaves the state in order to avoid service of process on him. What course of action can P take to acquire jurisdiction over D?
13. What must appear in the process or notice of suit in order to acquire jurisdiction over a defendant? By whom must the process be served?
14. In what way can the defendant contest lack of jurisdiction over him?

c) *Pleadings*

A

Courts are constituted to settle controversies which arise between persons. But obviously a court cannot intelligently pass upon the merits of a controversy until it is fully informed as to what the controversy is. The litigants must, therefore, in some way apprise the court of their differences. This, they must do in such an orderly manner that the court can get to the heart of the controversy as quickly as possible. In other words, the controversy must be stripped of all unessential facts by some process of elimination, leaving the bare issues for the consideration of the court. Unless this is done, the parties may wrangle indefinitely over non-essentials with the result that the court will never be in a position to reach any conclusion. The reduction of the controversy to issues is accomplished by a process which is known in law as *pleading;* and the statements of the parties by which this is accomplished, whether written or oral, are called the *pleadings*.

Every controversy can be reduced to an issue of fact or an issue of law. An issue of fact is a difference between the parties as to what actually happened in the external world. An issue of law is as to what consequences the law will attach to a given state of facts. P sues D and alleges that D promised to give him $100 on his birthday. D, by way of defense, may do one of two things: he may deny that he ever made the promise at all; or he may admit the making of the promise and contend that a promise to make a gift is not binding in law. If he does the former, an issue of fact has been reached for determination; if he does the latter, a question of law is presented to the court for its decision.

In some cases the facts may be admitted and then the controversy hinges entirely upon the legal consequences which the law will affix

to the admitted facts. In other cases, the facts may be in controversy while the rules of law applicable to the facts may be clear. In still other cases, the parties may differ both as to the facts and as to the consequences which will be applicable, however the facts may be found.

When the parties have reached an issue, either of fact or of law, the controversy is then ready for trial. In general, the jury determines all questions of fact and the judge decides all questions of law. In the case supposed above, whether a promise was ever made is a question of fact for the jury; whether the promise is binding in law is a question of law for the judge. In some instances a judge may try a case without the aid of a jury. In this event, the judges pass upon both issues of fact and issues of law.

B

BY EDWARD W. HINTON

When the parties were before the court, it became the plaintiff's duty to formulate a written statement of his claim, called his declaration, and furnish the defendant with a copy of it. This first pleading stated in a rather brief form the facts on which the plaintiff relied to impose liability on the defendant. For example, the plaintiff might allege that at a certain time and place the defendant with force and arms assaulted him and beat him to his great damage, etc., or that the defendant was indebted to him in a certain amount for goods theretofore sold and delivered to be paid for on request, and being so indebted undertook and promised to pay the same on request, but though often requested, failed and refused to do so, to his damage, etc. The defendant in turn must meet the declaration either by a demurrer or by a plea. If he failed to respond to it, the judgment could be rendered against him for the want of a plea, his failure to respond being taken as an admission of the truth of the declaration. The failure to plead had practically the same effect as a demurrer, since the court in order to render judgment, had to determine what, if any, legal liability resulted from the admitted facts. If the defendant met the declaration by a demurrer, he stated briefly in writing that the declaration was insufficient in law, to which he might add the specific reasons why it was insufficient. If no reasons were given it was a general demurrer. If reasons were given it was a special demurrer.

After the statute of Elizabeth, special demurrers were required where the objection was formal or technical. If the objection was

substantial, a general demurrer was sufficient for the purpose. The effect of the demurrer was to concede the truth of the claim in point of fact and to call on the court to determine the legal effect of the facts thus conceded. If only a general demurrer was used all formal or technial defects were waived except those specified. The special demurrer also raised the question of the substantial sufficiency of the facts stated to impose liability. When a demurrer was interposed, the plaintiff had no option but to join in demurrer, and the case was then ready for argument before the full court. On a general demurrer the question was always whether the plaintiff was entitled to recover a judgment on the fact alleged by his declaration and conceded to be true by the demurrer. There were several reasons why a plaintiff might not be entitled to recover a judgment: (a) it might be that he was not the proper party to sue, or that he had not sued the proper party; (b) it might appear that he had not brought the proper action; (c) or it might appear that the law did not attach any consequence to the matter complained of: e.g., the breach of a voluntary promise. After argument, the court entered judgment. If the court held the statement of the claim good in point of law, judgment was entered that the plaintiff recover. If the amount to be recovered was unliquidated, the judgment added, "damages to be assessed by a jury." If the amount was liquidated, final judgment for that amount was immediately entered. If the court held the claim insufficient in law, general judgment was entered for the defendant to the effect that the plaintiff take nothing by his writ, and the case was thus disposed of. At any time before judgment was rendered on the demurrer, the court might in its discretion either permit the declaration to be amended or permit the demurrer to be withdrawn with leave to the defendant to interpose a plea.

Under modern statutes, the parties are respectively given a right to amend, or withdraw the demurrer, where before it was a matter of discretion. If the defendant met the declaration by a plea, there were two general classes of pleas open to him: first, a plea in abatement, which did not go to the merits of the claim but simply set up some reason why the particular action should not be proceeded with, as, for example, where an infant plaintiff sued by attorney instead of by guardian, or where a married woman sued or was sued without the joinder of her husband. Such an objection disposed of the particular case but not of the merits of the claim. The other class of pleas were those in bar, that is, pleas going to the merits of the claim, which were again divided into two classes, negative and affirmative. A

negative plea denied the truth of one or more of the facts stated in the declaration. An affirmative plea conceded the truth of the entire declaration and set up some additional fact to avoid its effect. For example, to a declaration in trespass for assault and battery, the defendant might plead "not guilty," thus denying the truth of the charge in point of fact, or he might plead affirmatively that he acted in self defence, thus admitting the act of trespass and excusing or justifying it. Under the older law the defendant was limited to a single plea, but by later statutes the defendant might plead as many different defences as he wished to rely on; e.g., he might deny the charge, and also avoid it. If a negative plea was interposed, the plaintiff must either join issue on it or demur to it. He could not plead to a negative plea. If he demurred to it, he in effect asserted that it tendered no material issue or was not properly framed under the technical rules of pleading. In case of demurrer to a plea, the proceedings were much the same as in case of a demurrer to a declaration. The demurrer admitted the truth of the plea and simply questioned its legal sufficiency. But in passing on a demurrer to a plea, the court was forced to consider the sufficiency of the declaration, because if the declaration failed to state a good case, it did not need any defence and the plaintiff could never win unless he had stated a good case. The same judgment was entered on demurrer to a plea as in case of demurrer to a declaration. In case the plea was affirmative, the plaintiff might either demur or reply to it, and in turn, the reply might be either negative or affirmative. If the reply was affirmative, the defendant in turn might demur or rejoin and so on in turn until either a demurrer was interposed or an issue was joined on a negative pleading. If either party failed to plead or demur at the proper time, judgment for want of pleading would be entered against him. By this process then, of pleading or demurring in turn, the case would come before the court to render judgment on the facts admitted by the pleadings or an issue of fact would arise by the denial of some proposition alleged. Whenever issue was joined on a question of fact, the case was then ready for jury trial. The object of this system of pleading was to bring the case before the court for decision on a question of law arising on facts mutually conceded, or to bring the parties to issue on a disputed proposition of fact, the determination of which would settle the legal rights of the parties. An issue of fact arose whenever a proposition of fact was asserted by one party and denied by the other. The truth of the matter was

then to be tried and determined by the verdict of a jury based on the evidence presented to them.

C[1]

Having described the process by which the defendant is brought actually or virtually into court, I am next to consider the proceedings which take place in court. Of these, the first in order are the *pleadings;* by which are meant the formal statements of the complaint and defence, by the counsel of the parties preliminary to a trial. The professed object of these rules of pleading is to bring the parties to what is called an issue; that is, to extract from their allegations the exact matter in controversy, divested of everything extraneous, and resting upon direct affirmation and negation. At first view this would seem to be an easy thing. If the plaintiff would only state with clearness and precision the nature of his complaint, and the defendant do the same with regard to his defence, one would suppose that an issue might thus be made without any artificial rules; but instead of this, *special pleading* has been wrought up by a series of refinements into an art so difficult that it requires years of study and practice to master it.

The pleadings commence with the plaintiff's statement of his case, which is called the *declaration*, *narration*, or *count*. The caption specifies the State, county, court and term, the name of the parties and of the action. Then follows a full and formal *description* of the cause of action, which forms the main body of the declaration, and, of course, varies according to the circumstances of each case; but the precedents collected in the books of pleading are now so numerous as to meet almost every case that can arise. The *conclusion* states the damages as laid in the precipe and writ. The declaration thus framed is signed by the plaintiff's attorney, and filed in the clerk's office, where a copy is made out for the other party.

When the plaintiff has thus framed and filed his declaration, the defendant must answer thereto within the time fixed by the rules, or suffer consequences of *default*. There are two ways of answering the declaration; namely, by *demurrer* and by *plea*. And first by *demurrer*. To *demur* is to pause. The party demurring in effect declares that he will proceed no further, until he has the judgment

[1] Taken by permission from Timothy Walker, *American Law* (10th ed.), pp. 668–69, 670–71, 675–76, 577, 678, 681–82. (Little, Brown & Co., Boston, 1895.)

of the court whether the plaintiff, by his own showing, has any cause of action. Thus a demurrer admits the facts alleged by the adversary, but denies their legal sufficiency. It tenders an issue in law, for the decision of the court without a jury. It may be taken upon every pleading whatsoever, except a demurrer and a general issue; and it opens all prior pleadings to the examination of the court who gives judgment against the party committing the first error. Now a pleading may be defective either in substance or form; if in substance, the demurrer is general, that is, it does not specify wherein the defect consists; but if in form, the demurrer must be special, because it is required to point out the defects. A special demurrer, however, is so framed as to include a general demurrer, and thus cover defects in substance. An issue in law being thus tendered, the other party must accept it, or give up his cause. This acceptance is signified by putting in a joinder which merely asserts the sufficiency of the pleading demurred to; and the issue being thus made up, the case is ready for argument to the court. I will suppose, for example, that the defendant demurs to the plaintiff's declaration. If on hearing, the court sustain the demurrer, this is a decision that the declaration is insufficient, in which case, the plaintiff must either abandon his action or obtain leave to amend. On the subject of amendment, as already remarked, our law is very liberal, leaving the matter to the discretion of the court. In the present instance, the conditions of leave would probably be an affidavit of a meritorious cause of action, and the payment of all costs since filing the defective pleading. On the other hand, if the demurrer be overruled, this is a decision that the declaration is sufficient in law; in which case the defendant must either obtain leave to plead, on terms similar to the preceding, or suffer a judgment for the plaintiff's claim, to be ascertained by an inquiry of damages, if necessary.

If the defendant does not think proper to demur, his only alternative is to *plead*. A plea raises a question of fact, as a demurrer does a question of law. It occurs only in answer to the declaration; but it does not admit the law of the plaintiff's declaration as a demurrer does the facts; for the question of law still remains in reserve. It would seem at first view, that there could only be two kinds of pleas, namely, first, those which simply deny the allegations of the declaration, and which are called *traverses;* and secondly, those which admit these allegations, but evade their legal effect by setting up new matter, and which are called pleas of *confession* and *avoidance*. But

there is still another class, called *dilatory pleas* or *pleas in abatement*, because they operate merely to delay the proceedings, without touching the merits of the case; in contradistinction to which, all other pleas are called *peremptory pleas* or *pleas in bar*.

A traverse merely denies the allegations of the plaintiff without setting up new matter. There are two kinds of traverse, the *special traverse* and the *general traverse* or the *general issue*. The one specifically denies one or more of the plaintiff's allegations; while the other, in comprehensive language, denies them altogether. And it being a general rule in pleading that whatever is not denied is admitted, it follows that a special traverse requires the plaintiff to prove only those allegations which are specifically denied; while a general issue requires them all to be proved because they are denied.

Pleas in confession and avoidance are the only remaining class of pleas. They are commonly called special pleas, and used when the defendant is ready to admit the facts alleged, but has new matter upon which to rest his defense as a justification, discharge, or the like. This new matter in avoidance is set forth with the same particularity as in a declaration; and the plea, instead of tendering an issue to the jury as in a traverse, concludes with a *verification*. The plaintiff must then either demur to this plea or put in a *replication*. If he replies, it may either be by a simple traverse of the plea, or by a confession of the new matter of the plea, together with a statement of other new matter to avoid its effect. This last being a replication by confession and avoidance, must conclude with a verification, and not a tender of issue. The defendant, therefore, must either demur to it, or put in a rejoinder. If this rejoinder be a traverse, it brings the cause to an issue as before described. If a confession and avoidance, it requires a *surrejoinder* from the plaintiff; and so on, to a rebutter and a surrebutter. But it is very seldom that pleadings extend beyond the rejoinder; for new matter cannot be inexhaustible; and where new matter is not alleged, an issue either in law or in fact is always tendered and accepted, which terminates the pleadings.

C

From the foregoing readings the student should have acquired some acquaintance with the rules which govern the operation of the judicial machinery in the enforcement of rights. The forms hereinafter set out are illustrative of the processes by which the parties are brought into court and of the pleadings by which the controversy is reduced to an issue or issues.

PRAECIPE

Filed December 1, 1907

State of Illinois } ss.
Cook County }

Superior Court of Cook County
January Term, A.D. 1908

Thomas Anderson
Plaintiff
v.
Joseph T. Rogers
Defendant

The clerk of the said court will issue a summons in the above entitled cause to said defendant in a plea of trespass on the case upon promises to the damage of the said plaintiff in the sum of twenty-five hundred dollars, direct the same to the sheriff of Cook County to execute and make it returnable to the January term of said court, A.D., 1908.

JOHN WILSON, *Attorney for Plaintiff.*

To Charles W. Vail, Esq., Clerk
Chicago, December 1, 1908.

WRIT OF SUMMONS

State of Illinois } ss.
Cook County }

The People of the State of Illinois to the Sheriff of said county Greeting:

We command that you summon Joseph T. Rogers if he shall be found in your county, personally to be and appear before the Superior Court of Cook County, on the first day of the term thereof, to be holden at the Court-House, in the City of Chicago, in the said Cook County, on the First Monday of January next, to answer unto Thomas Anderson in a plea of trespass on the case upon promises, to the damage of the said plaintiff, as it is said, in the sum of twenty-five hundred dollars.

And have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

(Seal of the Superior Court of Cook County)

Witness, Charles W. Vail, Clerk of said court, and the seal thereof, at Chicago, aforesaid this 1st day of December.

December, A.D. 1907
CHARLES W. VAIL, *Clerk*

RETURN OF SHERIFF (Endorsed on Summons)

Served this writ within the County of Cook, State of Illinois, on the within named defendant by delivering a copy thereof to him this seventh day of January, 1908.
Fees, $1.00

CHRISTOPHER STRASSHEIM, *Sheriff*
By CHARLES JOHNSON, *Deputy*

DECLARATION

Filed December 20th, 1908

State of Illinois } ss.
Cook County }

In the Superior Court of Cook County
January Term, A.D., 1908

Thomas Anderson
v. } Assumpsit
Joseph T. Rogers

Thomas Anderson, Plaintiff, in this suit, by John Wilson, his attorney, complains of Joseph T. Rogers, defendant in this suit, summoned, etc., of a plea of trespass, on the case on promises.

FOR THAT WHEREAS, the said defendant heretofore, to-wit: on the 2nd day of April in the year of our Lord one thousand nine hundred and seven, at Chicago, in the county aforesaid, made his certain note in writing, commonly called a promissory note, bearing date the day and year last aforesaid, and then and there delivered the said note to the said plaintiff; in and by which said note the said defendant, by the name, style and description of J. T. Rogers & Co., promised to pay to the order of said plaintiff, by the name, style and description of Thomas Anderson, eighteen hundred dollars, four months after the date thereof, at the plaintiff's office in Chicago, with interest at five percent per annum for value received. By reason whereof, and by force of the statute in such case made and provided, the said defendant became liable to pay to the said plaintiff the said sum of money in the said note specified according to the tenor and effect of the said note; and, being so liable, the said defendant in consideration thereof, afterwards, to-wit: on the same day and year last aforesaid, and at the place last aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money in the said note specified according to the tenor and effect of said note.

NEVERTHELESS, the said defendant although often requested, etc., to wit: on the day when the said note became due and payable, according to the tenor and effect thereof, and oftentimes since, to wit: at the place last aforesaid, has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff, but to pay the same or any part thereof, to the said plaintiff, the said defendant has hitherto wholly neglected and refused, and still does neglect and refuse; to the damage of said plaintiff of twenty-five hundred dollars, and therefore the said plaintiff brings, suit, etc.

JOHN WILSON, *Plaintiff's Attorney*

COPY OF INSTRUMENT

CHICAGO, April 2, 1907

$1,800.00

Four months after date we promise to pay to the order of Thomas Anderson eighteen hundred dollars, payable at his office in Chicago. Value received with interest at the rate of 5 percent per annum.

J. T. ROGERS AND CO.

PLEAS

Filed March 5, 1908

State of Illinois } ss.
Cook County }

In the Superior Court of Cook County

Thomas Anderson
v.
Joseph T. Rogers

1. And for a further plea in this behalf said defendant says the plaintiff ought not to have or maintained his aforesaid action against him, because, he says, that he did not make, execute or deliver the promissory note in the declaration described, and of this he puts himself upon the country.

State of Illinois } ss.
Cook County }

Joseph T. Rogers being first duly sworn, says that he is the defendant in the above entitled suit and that the foregoing plea by him pleaded therein is true in substance and in fact.

JOSEPH T. ROGERS

Subscribed and sworn to before me, this 5th day of March, A.D., 1908.

A. M. BARKER, *Notary Public, Cook County, Illinois.*

[Notarial Seal]

2. And for a further plea in this behalf said defendant says that the plaintiff ought not to have or maintain his aforesaid action, because, he says,

that the plaintiff promised the defendant that he would never try to collect the note in the declaration described: and this he prays may be inquired of by the country. Wherefore he prays judgment, etc.

JAMES FITSGERALD, *Defendant's Attorney*

SIMILITER AND DEMURRER TO PLEAS

Filed March 10th, 1908

State of Illinois }
Cook County }

In the Superior Court of Cook County

Thomas Anderson }
v. }
Joseph T. Rogers }

And the said plaintiff, as to the first plea of the defendant by him above pleaded, whereof he puts himself upon the country does the like.

As to the second plea, he says that the same is not sufficient in law and he is not bound to answer the same. Therefore, for want of a sufficient plea in this behalf he prays judgment, etc.

JOHN WILSON, *Plaintiff's Attorney*

QUESTIONS

1. What is meant by "pleadings"? What is the function of the pleadings?
2. What is meant by an issue of fact? An issue of law? Who passes upon the former? Upon the latter?
3. How is an issue of fact raised? How is an issue of law raised?
4. What is the declaration? What function does it serve?
5. What is a plea? Name the different kinds of pleas. What function does each kind serve?
6. What is a demurrer? What function does it serve? What is the difference between a general and a special demurrer?
7. What is a replication? A rejoinder? A surrejoinder? A rebutter? A surrebutter?
8. What is the difference between a traverse and a plea in confession and avoidance?
9. P sues D alleging that D promised to pay him a certain sum of money. D's defense is that he never made the promise. How will he plead?
10. In the foregoing case, D's defense is that the promise was secured by fraud of P. How will he plead?
11. P brings an action against D on a promise to pay money. D's defense is that since more than five years have elapsed since the cause of action arose it is barred by the statute of limitations. How will D plead?
12. In the foregoing case, P will be able to show that since the elapse of the period in question D has made a new promise to pay the money. How will P plead?

13. In the foregoing case, D wishes to raise the question as to whether the obligation to pay the money is revived by a promise made after the running of the statute. How will he plead?
14. P brings an action against D on a promise to make the former a gift. D interposes a demurrer to the declaration. What happens in case the court sustains the demurrer? In case the court overrules the demurrer?

d) Trial

A

BY EDWARD W. HINTON

The party desiring to bring the case on for trial then applied for a jury summons. This writ directed the sheriff to summon a jury from the proper county and have them before the court at a specified time to try the issue joined between the parties unless one of the justices of the court came into the county before such date, in which event the sheriff was to have the jury before that justice. As a matter of fact, a justice holding assizes was expected to go down to the proper county so that normally the jury came before the single judge instead of the full court at London. This judge took with him a copy of the pleadings so that the precise question for trial was known in advance.

Of the respective functions of the judge and jury at this trial, it is frequently stated broadly that it is for the judge to decide all questions of law, and for the jury to decide all questions of fact. But this statement must be taken with considerable qualification. It is for the judge to decide all questions whether of law or fact preliminary to the submission of the issue to the jury. The judge decides all questions as to the competency of witnesses and the admissibility of evidence, and in so doing decides many questions of pure fact, for example, whether a written instrument is really lost, so as to admit a copy in evidence; the judge construes the pleadings and determines what questions are in dispute under the issue; he determines which party has the burden of producing evidence, and the logical relevancy of the evidence offered; he determines what inferences may rationally be drawn from the evidence, and whether the evidence fairly makes a question to be submitted to the jury.

So far as the issue itself is concerned, it is generally easy enough to draw the line between questions of law admittedly for the judge, and questions of fact for the jury. Whether A struck B, and if so, under what circumstances, whether accidentally or intentionally,

whether for the purpose of protecting himself, or for some other purpose, are all obviously pure questions of fact to be settled by the findings of the jury upon the evidence presented to them. What legal consequence attaches to the matters so found depends on a rule of law, and is a question for the judge. But in a class of cases, of which negligence is a good example, the matter is much more complicated. When the jury have determined all the ordinary questions of fact; i.e., what the defendant did and under what conditions and how it affected the plaintiff, the judge is unable to apply the law because there is no formulated rule for that precise situation. Such a case is governed by a general rule that the defendant is liable if his conduct under the given conditions was negligent; i.e., lacking in that degree of care which a reasonably prudent man would have exercised under the same circumstances. This raises a further peculiar question, viz., what would a reasonably prudent man have done. This differs from an ordinary question of fact, which involves merely an answer to the question, "What happened?" It also differs from an ordinary question of law. Whether such a question should really be classed as law or fact, it is generally left to a jury to decide, though several very similar questions, e.g., probable cause, and the meaning of written language, are left to the judge.

After the jury was selected and sworn to try the issue, the trial began by the opening statement of counsel, each side explaining briefly to the jury what they expected to prove. This was followed by the formal introduction of the evidence. The party holding the burden of proof, that is, normally the one having the affirmative of the issue, was required to begin and to introduce sufficient evidence in the opinion of the judge to fairly warrant the jury finding the issue in his favor. If he failed to introduce any evidence or failed to introduce sufficient evidence, that is, evidence from which the jury might rationally find the truth of each fact asserted by him, it was the duty of the trial judge to direct a verdict against him. If the party holding the burden introduced sufficient evidence to make the question a fairly debatable one for the jury, the adverse party might either submit the case without any further evidence or introduce such countervailing evidence as he had. When the evidence was closed, each party was entitled in person or by counsel to address the jury and explain and argue the effect of the evidence in sustaining their respective contentions. At the close of the argument the judge had the right on his own motion, and was bound if requested by either

side, to instruct the jury. These instructions consisted in explaining to the jury what question or questions they were to decide and what verdict they should return accordingly as they found certain propositions of fact to be proved or unproved. Such instructions were given in the hypothetical form. For example, the judge would tell the jury that if, from the evidence, they found facts A, B, and C to be true, they would find the issue for the plaintiff, but if they were not satisfied that the facts were true, then they would find the issue for the defendant. The jury were then entitled to retire for deliberation and were required to return a unanimous vote verdict. This verdict might be either general or special. It was general if the jury simply found the issue in general terms for the plaintiff or for the defendant. It was special if the jury set out in their verdict the specific facts that they found to be true. If they were unable to agree on either a general or special verdict, a mistrial resulted and a new jury might be summoned.

The judge before whom the case was tried attached the verdict to the copy of the pleadings and returned it to the full court where the issue had been made up. If, during the progress of the trial, the judge made any ruling admitting or rejecting evidence or in directing a verdict, or refusing or directing a verdict or in instructing the jury or refusing to instruct or any ruling on any other question connected with the trial, the party against whom such ruling was made was deemed to acquiesce in the ruling and assent to it unless he made a formal protest which was called an exception. If he desired at some later stage of the case to have the correctness of such ruling reviewed, he was required to present a bill of exceptions which would state so much of the proceedings as was necessary to understand the particular ruling of the judge complained of, and would show the formal protest or exception to it. If such a bill of exceptions truly stated the proceedings, the judge was required to sign it as a true bill and authenticate it by his private seal and attach it to the papers in the case. The next proceedings would take place before the full court in London to which these various papers were returned. The losing party might at first apply for a new trial, either on the ground of errors committed by the judge, in his various rulings, or on the ground of misconduct or misbehaviour by the jury, or on the ground of mistake by the jury, or on the ground of newly discovered evidence which ought to change the result. Such an application for a new trial was

addressed solely to the discretion of the full court and its ruling in either granting a new trial or refusing a new trial, was not reviewable. By modern statutes, both in England and in the United States, appellate review has been provided in the case of the refusal of a new trial. So far as the application or rule for a new trial was based on rulings of the judge, it raised precisely the same questions that might have been brought before an appellate court on the bill of exceptions. If a new trial was refused, the losing party might either move in arrest of judgment or for judgment notwithstanding the verdict. The motion in arrest of judgment was an application to prevent the rendition of any judgment on the ground that the plaintiff's pleadings though true in fact did not entitle him to recover as a matter of law. The motion for the judgment notwithstanding the verdict was based on the theory that the verdict decided an immaterial point only and that on the facts admitted by the pleadings, the losing party was entitled to judgment. The rulings on these motions like the ruling on the new trial was not reviewable by an appellate court. The motion for a new trial or in arrest of judgment was usually heard on a rule (*nisi*) to show cause. That is, on the filing of the motion, if apparently well taken, the court would make a provisional order that it be sustained unless (*nisi*) the adverse party showed sufficient cause to the contrary at the time fixed for the hearing. At such hearing the rule was made absolute or discharged, according to the final opinion of the court on the points involved.

After such motions had been disposed of, if a new trial was denied or the court refused to arrest the judgment or to enter judgment notwithstanding the verdict, final judgment as a matter of course was rendered on the verdict. The judgment on the verdict represented the legal effect or result of the facts admitted by the pleadings, plus those found to be true by the verdict. The judgment like a judgment on demurrer was to the effect that the plaintiff recover so much from the defendant and have execution therefor; if for the defendant, it was to the effect that the plaintiff take nothing by his writ. Under the English practice cases were frequently brought before the full court after verdict on a rule entered by agreement reserving a decisive question of law and providing that the actual verdict might be disregarded and a verdict for the plaintiff or defendant as the case might be, should be substituted, according to the decision of the question reserved.

B[1]

The clerk of the court is required to keep a docket of all cases pending in the court. This is a book in which the style of all cases and also the date of the most important actions which are taken therein, and a short memorandum of every ruling or decision by the judge in the case are entered. Cases are entered on this docket in the order in which they are instituted. When the session of the court begins, the judge takes this docket and calls the cases in the order in which they are entered there. As each case is called for trial, some disposition must be made of it. This may be a postponement to some later time during that term of the court, or to a next term, or a trial of the case. Postponements are not made, except for good cause. A postponement to the next term is called a continuance. When the case is called for trial, all unsettled motions and questions of law arising on the pleadings are presented to the judge, and he decides them, and the matters of fact to be tried are thus definitely ascertained.

When the trial is ready to begin, if there is to be a jury, it is selected and sworn to try the case. They then determine all questions of fact involving the merits of the case. If no jury is to sit, the judge determines both the law and facts. After the jury is impaneled, or immediately on announcing ready for trial, if there be no jury, the pleadings, as settled by the rulings on the demurrers, are read, and the testimony is introduced. After the close of the testimony, the legal propositions are discussed to the judge and the facts argued before him, or the jury, as the case may be. If there be no jury, the judge announces his decision then, or takes the case under advisement and announces it later, and judgment is entered in accordance therewith.

If there be a jury, when the argument before them is concluded the judge delivers his charge. This is a clear and accurate statement by the judge to the jury of all the rules of law applicable to the facts in evidence, by which they are to be governed in deliberating on the case and making up their decision. It should be fair and unbiased, giving the very law of the case being tried—no more, no less.

After receiving the charge, the jury retire in charge of an officer, and are kept together and from association with other persons until they arrive at a unanimous decision called a verdict. This is then

[1] Taken by permission from John E. Townes, *Elementary Law* (2d ed.), pp. 507–8. (T. H. Flood & Co., Chicago, 1911.)

reduced to writing, signed by one of their number styled the foreman, and returned into open court, where it is received by the judge and inspected and, if in due form is read to the clerk. If informal the attention of the jury is called to the defect, and it is cured, and then the verdict is received. It is filed and entered on record. The jury is then discharged from the case, and the attorney of the successful party prepares a formal judgment, which is entered on record.

The judgment is the final result of the trial. It is the culmination of the whole proceedings, and authoritatively establishes and declares the legal rights and liabilites of the respective parties to the suit in the matters of controversy and awards the proper remedy. It is binding on them, and all persons claiming under them and cannot be disputed or avoided by any of them except by a direct proceeding for revision.

QUESTIONS

1. After an issue of fact is reached, what is the next step in the proceedings? Suppose an issue of law is reached, what happens?
2. After the jury is selected, trace the succeeding steps of the trial until verdict and judgment.
3. How is the jury selected for the trial of a case?
4. In the trial who decides questions of fact? Who decides questions of law?
5. What is meant by saying that the burden of proof rests upon him who has the affirmative of the issue?
6. What is the purpose of the instructions of the court to the jury?
7. Suppose that one party feels that the judge, in passing upon the pleadings, in admitting or excluding evidence, or in giving instructions of law to the jury, has erred, how can he take advantage of such errors?
8. After the return of the verdict, what steps are open to the losing party?
9. If the court refuses to grant a new trial, is this ruling assignable as error of review? Suppose he grants a new trial, can the other party assign it as error on appeal?
10. What is a motion for judgment notwithstanding the verdict? Motion in arrest of judgment? Are the rulings of the trial court on these motions reviewable?
11. What is the difference between a general verdict and a special verdict?

e) Appellate Review

A

BY EDWARD W. HINTON

Whenever final judgment was entered against a party he could bring it before the proper appellate court as a matter of right, by means of a writ of error. This writ was obtained like any other writ from

the chancellor's office, and commanded the judges of the trial court to transmit a copy of the record in the case to the appellate court in order that justice might be done, and at the same time, a summons was issued for the adverse party summoning him to appear in the appellate court and answer the claim of error in the record. In obedience to this writ the clerk of the trial court made up a copy of the record which consisted of the pleadings, demurrer if there was one, verdict if there was one, and the judgment, and if a bill of exceptions had been allowed it was included in the record. In other words, the record was said to consist of two parts. The first, the record proper, consisting of the writ, pleadings, verdict, and the judgment; and second, matters of exception preserved in the bill of exceptions. When this record was returned in obedience to the writ of error, the party against whom judgment was rendered, who was known as the plaintiff in error, then prepared an assignment of errors and furnished the adverse party with a copy of it. This assignment of errors was simply a brief statement of the errors of law in the record of which he complained. The adverse party might plead to this assignment such defences as the statute of limitations or a release of errors, or he might plead the general issue which was to the effect that there were no such errors as alleged. The court tried this issue simply by inspecting and examining the copy of the record in the case on which counsel were heard in argument. Any question decided by the lower court was open for re-examination in the appellate court, except the correctness of the verdict in point of fact, and mere discretionary rulings. The sufficiency of the pleadings and verdict was always open to review, that is, what was the proper legal result of the facts thus admitted or established. Other matters were open to review only so far as they were preserved by exceptions. If an exception was taken to the admission or rejection of evidence, then the correctness of that ruling was reviewable. So in case an exception was taken to the direction of a verdict or to refusal to direct, or to the instructions given or to the refusal to give a particular instruction. If the appellate court found error in the record, it might render a judgment reversing and annulling the judgment below or reversing and annulling with directions for a new trial. If the court found no error in the record, it rendered judgment affirming the judgment below.

B[1]

In the early history of the law all suits at law were reviewable by *writ of error*, and by writ of error only. This was a proceeding begun in an upper or reviewing court as a new suit. It was, in legal effect, a suit by the defeated party against the successful party and the court which had given the judgment. The lower court is proceeded against when it is ordered to send up the record of the case. Suits in equity, on the other hand, were reviewable by *appeal*. This method of review did not partake of the character of a new suit, but was rather a continuation of the proceedings in the court below. No service of process was required, as the party who was successful was bound to follow the proceeding, after the appeal was perfected below. As a result, he was brought into the upper court with the case, and it was reviewed as though it were merely a continuation of the case in the court of original jurisdiction.

In the federal courts, these methods of review, the writ of error being used only to review a law case and the appeal to review an equity case, have been continued to the present time (*United States* v. *Emholt*, 105 U.S. 414). The state courts of many states have been permitted, by statute, to depart from this practice of reviewing a suit at law by writ of error only and an equity case by an appeal. In some, either a suit at law or in equity may be reviewed by either a writ of error or an appeal (*Anderson* v. *Steger*, 173 Ill. 112). More commonly, perhaps, only an appeal is authorized in either case.

In the early history of the law, the only parts of a proceeding in a suit at law that were subject to review were those that existed in the process, pleadings, and judgment. If the court below committed an error in sustaining or overruling a demurrer, or in entering a judgment on insufficient and defective pleadings, the reviewing court could review these errors. The record did not include what occurred before the jury. The rulings as to the qualifications of jurors, the competency of witnesses, the admissibility of the evidence, and upon motions for peremptory instructions or other motions, did not appear in the record, and although prejudicial error was committed in these respected, no review could be procured on the rulings.

By the assistance of statutes, however, it became possible for the aggrieved party to request that the judge certify to the various rulings he made, to which the party, against whom they were made, excepted

[1] Taken by permission from F. W. Henicksman, 11 *American Law and Procedure*, Practice, pp. 376–82. (La Salle Extension University, 1913.)

(*Yarber* v. *Chicago & Alton Railway Co.*, 235 Ill. 589, 598). These separate rulings and exceptions were then made a part of the record, and became known as the bill of exceptions. Upon the record, consisting of the process, pleadings, judgment, and bill of exceptions, the reviewing court could review not only what occurred before the trial judge, in the absence of the jury, but what occurred before the jury in the way of rulings. If the rulings before the jury were incorrect and erroneous, a reversal would result. The modern practice universally allows a review upon rulings shown by bill of exceptions. As a consequence, the entire action of the lower court is subject to supervision and correction by the court of review.

The question of the jurisdiction of the parties and of subject matter of the cause, for the reviewing courts, is similar to that of the courts of original jurisdiction. To determine what court has jurisdiction of the subject matter, where there is more than one reviewing court, the state statute or constitution must be consulted. The jurisdiction of the person, in cases where a review is sought by appeal, is of no importance, as the parties follow the cause; and, if the court below had jurisdiction, no question can be raised as to it on appeal. With reference to the writ of error the rule differs, however; as stated above, this is a new suit instituted by the aggrieved party, and, being such, the other party must be notified of it, that is, he must be served with process (*Wiley* v. *Neal*, 24 Neb. 141). It is thus quite analogous to the service of process in lower courts, that the reviewing court procures jurisdiction of the person of the defendant in error, as the successful party below is known in the reviewing court. If the defendant in error is a non-resident, service may be procured by publication, as the judgment of the lower court is looked upon as having a situs in the state sufficient to permit service by publication upon a non-resident, as in cases where he has property in the state.

In the reviewing courts no further pleadings are required. The record of the lower court is acted upon, and, in order to draw the reviewing court's attention to the particular parts of the record, in which it is claimed the lower court committed prejudicial error, assignments of error are required. These inform the court and the opposite party what points are relied upon to procure a reversal. After the record of the lower court has been filed above, and the assignments of error have been presented, then the party asking the aid of the reviewing court presents a brief of the points upon which he relies to procure a reversal. Sometimes this is accompanied by an

argument. In the brief the authorities relied upon are cited and the rules of law enunciated. In the argument the rules are discussed and the authorities commented upon. The successful party replies to the brief and argument of his opponent in a similar manner, and, in some courts, the moving party may file a reply brief. The briefs of counsel are intended to enlighten the court upon the law and the facts in the case, having in view particularly those points upon which it is claimed the lower court erred. The court may or may not hear oral arguments according to its rules. After a consideration by the court of the briefs and arguments, if any, a conclusion is reached with reference to the lower court's rulings. If it is found that the lower court did not commit an error, the judgment or decree is affirmed. If on the other hand, error is found, it is reversed. It may be remanded or not, depending upon the practice in the jurisdiction and upon the nature of the order of the reviewing court. If remanded, it is accompanied by an order to the lower court to proceed in conformity with the judgment of the reviewing court.

In several states there are intermediate reviewing courts to which an appeal or writ of error is taken in the first instance from the trial courts, and, under statutory conditions, further appeals or writs of error may be taken from these intermediate courts of review to the highest courts of the jurisdiction. The same is true of the Federal courts.

According to the procedure at common law, reviewing courts are merely courts of correction. Their function is to examine the proceedings below upon matters of law only (matters of fact being left exclusively to the jury and trial judge), and if error of law was committed, the judgment of the lower court is reversed and the case remanded for a new trial.

The new trial is conducted on the same lines as the original trial; a new jury is impaneled, the jurors are examined on their *voir dire*, the opening statements are made by counsel to the jury, witnesses are heard and evidence introduced as at the former trial. The only substantial difference that occurs is with reference to the point or points upon which the judge erred in the first trial. If he excluded what the reviewing court held to be material evidence, or admitted incompetent evidence, according to the reviewing court's opinion, he excludes this. The error committed at the first trial may have been with reference to an instruction to the jury. At the new trial instructions are given substantially as they were at the first, except that any error therein that occurred at the first is corrected.

Upon the completion of the second trial the defeated party again has the right to ask the reviewing court to examine the proceedings for error, and a third trial may result in which the proceedings again follow substantially the outline given in the above. This may continue until the trial court proceeds without committing any substantial error. As high as seven successive trials have thus been had in a single suit.

By statute, the function of the reviewing courts is greatly enlarged by the fact that the trial judge's ruling in denying a motion for a new trial is made reviewable. The action of the judge at common law in granting or refusing a new trial was a discretionary matter and not open to review. The statutes have not caused the exercise of that discretion in granting the motion to be reviewable, but have caused the refusal to grant the motion to be subject to review. It is here that the reviewing courts are empowered to examine the facts of the case to see whether the lower courts erred in its conclusion that the verdict was in accordance with the preponderance of the evidence, as well as to examine the rulings upon the law made during the cause of the proceedings. As an adjunct to this function of examining the facts, they are empowered to enter up a finding of facts contrary to that of the jury and trial judge, and to enter a final judgment thereon. They may even issue execution as a trial court may. This is, however, a subject of statute entirely. In such cases the cause is not remanded and no other proceedings are necessary in the trial court.

QUESTIONS

1. Point out the difference between a writ of error and an appeal.
2. It is said that a writ of error is the beginning of a new suit and that an appeal is but the continuation of an old suit. What is meant by this?
3. When a case is carried to an appellate court for review, is it necessary that process shall be served again on the defending party?
4. What are the names of the parties in the trial court? What are their names in the appellate court when the review is by a writ of error? What are their names when the review is by an appeal?
5. Are there further pleadings by the parties when a case is carried to a higher court for review?
6. What is the bill of exceptions or assignment of errors? What does it consist of? How is it prepared and by whom?
7. List the possible ways in which the trial court may err in the trial of a controversy? Are all these errors reviewable by the appellate court? Are they reviewable if no objections are made to them in the trial court?

How can party assure himself that he can have all doubtful rulings reviewed by the appellate court?

8. What is meant by a motion for a new trial? Suppose that the trial court denies the motion, is this ruling assignable as error in a review of the trial court's proceedings? Suppose that he grants a new trial, is this ruling reviewable in the appellate court?
9. Suppose that the appellate court is of the opinion that the verdict and judgment of the lower court are correct, what course of action does it take? What course of action does it take, in case it is of the opinion that the lower court committed errors in the trial of the controversy?
10. How often may the same case be carried to the appellate court for review? What protection has the winning party against dilatory and *mala fide* appeals?

5. The Study of Cases

A

It should be pretty obvious now, in the light of previous discussion, that cases are studied because judicial decisions constitute one of the two ways in which the law is enunciated. "The great body of the common or unwritten law is almost entirely the product of decided cases accumulated in an immense series of reports extending back with scarcely a break to the Reign of Edward I, at the close of the 13th century."[1]

The study of cases of any judicial system is helpful in so far as such study will throw light upon the solution of future controversies. But under the common law system this study of cases is peculiarly necessary because of the sacredness with which past decisions are held. Under the civil law system past cases do not bind courts in the adjudication of future questions. They have only a persuasive effect upon the courts in the future and are influential only to the extent that they have been well considered and appeal to the court's reason and sense of justice. Each controversy is considered as an original proposition and the court is not *ipso facto* bound by a previous decision on the same or similar point. The common law system proceeds from a fundamentally different viewpoint—that a decision once laid down becomes a precedent, to be followed in the future by that court and by all courts subordinate to it, in passing upon the same or similar questions.

It has been asserted that the common law theory that a decision once enunciated becomes a precedent for future courts is based upon the

[1] Holland, *Jurisprudence* (7th ed.), p. 159.

presumption that a given case, so long as it stands, is the best available evidence of what the law is. At best this is more or less fictitious and standing alone would hardly justify the doctrine of *stare decisis*. It would seem that a much more plausible reason for the doctrine is that courts should follow previous decisions to the end that the law may have certainty and stability. Adherence to past doctrines may very well tend to perpetuate "out-worn creeds" and consecrate the blunders of the past, but as Lord Eldon once said: "It is better that the law should be certain than that every judge should be speculating on improvements in it."[1] Moreover, in any case, as is frequently pointed out by courts, if the common law proves itself inadequate, the safest and wisest way of correcting the defect or of remedying the situation, is to appeal to the legislature for proper legislation.

Decisions are either authoritative or persuasive. By the former is meant that a court has no alternative but to follow a given decision. By the latter is meant that the court may be influenced by the logic and justice of a given case even though it may be under no duty to follow it. Within a given jurisdiction all decisions of the highest court are authoritative, not only for the court itself, but for all other courts of the same jurisdiction. However, the decisions of the highest courts of one jurisdiction have only a persuasive effect upon the courts of another jurisdiction. For instance, a decision of the Supreme Court of the State of Illinois is authoritative for that court and for all other state courts of Illinois. But the same decision, if cited and relied upon in a court of the State of Indiana, is only persuasive. If the logic of the case is sound, if the result is just, and the Indiana court is not already committed to some other doctrine, the decision will, in all probability, be adopted by the Indiana court.

But it is not to be inferred from what has been said that an authoritative decision once pronounced must be respected and applied by subsequent courts until abolished by legislative action. Prima facie, in order that certainty and stability in the law may be preserved, past decisions should be followed. But circumstances may exist where blind adherence to precedents will be productive of more evil than good. If a decision is uttered by a court contrary to a well established line of cases, unless some special reason exists for departing from the beaten path, a subsequent court may, and probably should, overrule such a decision. Again, if a court has enunciated some doctrine palpably wrong and not supported by any respectable

[1] *Sheldon* v. *Goodrich*, 8 Vesey, 497.

authority, it would be sheer folly for a later court to sanction and more firmly establish the error.

At the outset, in this attempt to set up some guide-posts for the study of cases, the attention of the student must be directed to two fundamental principles governing courts in the exercise of their judicial powers. In the first place, courts are established for the purpose of settling controversies which the parties are unable to settle by their own efforts in a peaceable manner. "The law, obviously enough, is simply a system of rules created by society as a substitute for violence with the utilitarian purpose that the life of the community may be peaceful and productive."[1] Accordingly the parties to a controversy may, as a matter of right, call upon the legally constituted tribunals of the state to decide their controversies in one way or another. It is, of course, not pretended that the court will always decide correctly, but it must be obvious that it is worth a great deal to the peace and prosperity of the community that the state has created an agency and given it power to speak the final word in all controversies properly referred to it.

In the second place, and equally important, courts are not constituted to decide hypothetical questions which the curious or idle may refer to them. Each case in the reports represents the corpse of a once flesh-and-blood controversy. There are two very good reasons why courts should not spend their time in deciding this class of non-controversial questions. In the first place, the highly expensive legal machinery would be unduly burdened in the consideration of many relatively unimportant questions. In the second place, it would mean that courts, anticipating controversies and formulating rules for their solution, would be usurping strictly legislative functions. However, in this connection, it should be noted that courts frequently, in considering an actual controversy, anticipate possible related controversies and pass judgments on them. But, as will be pointed out later, such premature judgments do not have the force of law by virtue of their utterance in the particular case under consideration.

B

There are certain mechanical features of a reported case to which the student's attention should be called before he takes up the study of cases. The first of these features is the statement of the parties and their designation. The one who brings the action in the lower court is ordinarily called the plaintiff, and the one against whom it is

[1] Cooley, *Brief-Making* (3d ed.), p. 288.

brought, the defendant. In chancery proceedings, the complaining party is known as the complainant and the party defending is known as the respondent or defendant. After decision by the lower court, if the case is carried to a higher court for review by way of appeal, the one who takes the appeal is then designated as the appellant, and the other as the appellee. If the review is by way of writ of error, the one who alleges errors will become the plaintiff-in-error, and the one who defends against error will become the defendant-in-error, in the higher court, regardless of their respective designations in the court below.

The statement of the parties, or the caption, is usually followed by a headnote or headnotes. These are prepared either by the judge or judges who delivered the opinion, or, more commonly, by a reporter. They represent either a brief digest of the case or a synopsis of the rules of law which the court has discussed in the opinion. In the latter case, the synopsis is not necessarily limited to the principles of law, the declaration of which was necessary in settling the controversy before the court. Headnotes, regardless of the form they may assume, are useful only in indicating in a very general way what rules of law are involved in the decision. They should never be relied upon as the means of discovering the doctrine of the case. They are guide-posts to the casual reader of a case but are not a source from which the law of the decision is to be deduced.

In most cases following the headnotes, there will be a statement of facts. This statement, usually prepared by the judge who delivers the opinion, will give the material facts of the controversy, will summarize the pleadings which took place in the trial of the case, and will indicate how the case was disposed of by the lower court. In many instances the statement of facts will not appear as a separate part of the case but will be incorporated by the court into its opinion. In any event, the statement of facts, whether appearing separately or as a part of the opinion, will be useful to the student in several ways. It assists him in getting the controversy clearly in mind; it aids him in discovering the issues which are presented for the court's decision; and it gives him a brief history of the trial of the case in the lower court.

Frequently, but not always, the statements of facts will be followed by digests of the arguments of counsel. These digests may be useful to the student in one of two ways. They usually contain a comprehensive and fairly discriminating collection of authorities on the points of law involved in the case. Again, the arguments to the

extent that they are reprinted will assist the student in visualizing the issue or issues between the litigants.

Next in order comes the opinion of the court. The court, that it may reach a sound, rational judgment concerning the conflicting claims of the litigants, must necessarily go through certain reasoning processes. If these processes are crystallized into a spoken or written exposition and defense of the judgment, they become the court's opinion. A court may, if it sees fit, and sometimes does, hand down its decision without giving any opinion at all. But if this practice were generally indulged in, it is likely that cases would not receive the mature and thorough consideration which they might otherwise receive. Moreover, those seeking for the principles of law wrapped up in the cases, without the aid of opinions, would be groping in the dark and to a greater or lesser degree would have to guess at what was in the mind of the courts. Accordingly in all cases where any considerable doubt exists, courts usually give their opinions and these opinions are printed as a part of the case.

When the court has given its opinion in defense and elucidation of its conclusion it is ready to pronounce its formal judgment, which is the last stage of the case. This will be a statement that the decision of the lower court is affirmed, reversed, reversed and remanded, or some other appropriate words to make operative its conclusion.

If it is now clear that the law is developed in a series of decisions based upon actual controversies, and that each decision is normally a precedent for courts in the future, it is next in order to consider the doctrine of a case. By "the doctrine of the case," as here used, is meant the broadest principle of law which can be deduced from a given case consistent with its facts.

When one is confronted with a case for dissection or analysis, there are three questions which must be answered if the study is to be critical and intelligent. (1) What does this particular case decide? In other words, the problem is to discover the doctrine of this one case without reference to other cases which may have gone before it. (2) How much weight is to be given to the doctrine of the case at hand? In the evaluation of the doctrine of the case, the task is to see if there are any elements of the case which may weaken it as a precedent. (3) How does this decision accord with previous decisions on the same or similar subject-matter? To answer this question it is necessary to compare the doctrine of the case with the doctrine

of previous cases, to see whether the decision can be fitted into the general scheme of the jurisprudence already established, or whether it represents a departure from the beaten path.

Quite obviously the novice will experience great difficulty in answering with accuracy and skill these various questions. Practical suggestions and hints will aid him from the beginning in answering the first two questions. But only after he has gained a considerable background in the law can he hope to appreciate in any large measure the problem involved in the third question.

A three-fold task must be performed in discovering the doctrine of a case and converting it into a rule of law. First, there are certain more or less mechanical processes of finding out just what the court decided. This can be done without reference to the opinion. Moreover, it is possible on the basis of the actual decision to frame a rule of law of the case without the aid of the opinion. In fact, in those cases where the courts have delivered no opinions, this is the only way of discovering the doctrine of the case. The second task is to analyze the opinion in order to determine the principles of law upon which the court based its judgment. In the opinion will be found the court's exposition and defense of the doctrine of the case as it lies in its own mind. The final task is to formulate and state the doctrine of the case or the proposition of law in the light of the actual decision and the court's exposition of it.

It is necessary, in the first place, to examine briefly the processes essential in finding out precisely what the court decided. The first step is to gain a thorough mastery of the facts involved in a controversy. The next step is to find out and frame the issues between the parties. In order to be able to do this skillfully and intelligently some understanding of procedure and pleading is necessary. The issues should then be stripped of as many unessential facts as possible and stated as broadly as the essential fact will justify. Finally, the answer of the court to the various issues must be found. The answer of the court to a given issue will be the court's holding on that point. To take a simple case as an example, John Jones, a farmer, sues Tom Smith, a carpenter, on a promise of the latter to give the former $100 within thirty days. Smith demurs to the declaration. The demurrer raises this issue of law: Is the promise to make a gift of money enforcible? The court sustains the demurrer and thereby answers the question in the negative. This answer is the court's decision on this point of law.

From the decision reached in the supposititious case in the foregoing paragraph one might deduce a rule of law without reference to an opinion of the court. If the court gave no opinion, the rule would have to be deduced from the decision alone if deduced at all. But before attempting to set down any rules to guide in formulating and stating the rule or rules of law from a case, it is desirable to examine certain outstanding features of an opinion and see what bearing they have upon the discovery of the doctrine of a case.

In the first place, it may be said that the function of the opinion is to explain and defend the conclusion which the court has reached. From this exposition and defense the student will receive valuable aid in discovering and understanding the doctrine of the case. In its opinion the court will frequently analyze and discuss the facts of the controversy. This analysis will aid in seeing more clearly the issues which are to be answered by the court. It will also assist one in determining whether certain facts are material and must accordingly be incorporated in the rule of law deduced from the decision. Again, the court, in its opinion, may state in clear, concise words the precise rule of law applicable to each issue. Finally the court will usually set out the reasons which induced it to hold as it did. These reasons will be helpful in understanding the rule of law involved and defining the limits of its applicability.

In the second place, it must be understood that the words of the court are not *per se* to be taken as the doctrine of the case. The opinion, as already pointed out, is but the court's defense of the conclusion it has reached. It is perfectly natural, therefore, that the court should indulge in much discussion, by way of illustration or analogy, helpful to the court in reaching a sound judgment and enlightening to the reader in comprehending the judgment, but not strictly necessary so far as the doctrine of the particular case is concerned. Any statement made by the court not necessary to the doctrine of the case under consideration is called a *dictum* or an *obiter dictum*.

Dicta uttered by the court may be sound, logical, and just, and, moreover in the proper setting, may be perfectly good law. But in seeking for the rule of law in a given case, dicta must be ignored. Two reasons are commonly given why dicta should not have the force of law. In the first place, it is said that since the points on which the court has uttered dicta are not in issue, that these points are not likely to have received that consideration and thought necessary to

treat the dicta as law. In the second place, it is said that the court is presuming to pass upon questions not properly referred to it: in other words, that the court is, in fact, passing judgment on hypothetical cases.

But it must not be inferred from what has just been said that dicta are without any effect. Well-considered dicta may have much influence with subsequent courts. In many instances, of course, dicta in one case represent perfectly good law as established by other cases. Again, when enunciated by a strong court on some new point, they approximate very closely the dignity of law. In rare instances a dictum by a scholarly judge may be much more influential as a precedent than many decisions from less influential courts. It must be noted, however, that in all these instances dicta are influential in a persuasive and not in an authoritative manner.

In the third place, in many instances certain doctrines are necessarily wrapped up in cases by implication and do not expressly appear at all. Suppose, for instance, that A, while sligh ly intoxicated, promises to sell his horse to B, an infant, and that B, knowing of A's intoxication, promises to buy the horse. Let it be assumed that in an action by B against A, two defenses are relied upon in the lower court: (*a*) that A was mentally incapacitated to contract at the time, and (*b*) that B was an infant, not bound by his promise, and that, therefore, A should not be held bound to his. Suppose that on appeal the higher court affirms the decision of the lower court in favor of B, but in its opinion discusses only the effect of A's intoxication upon the agreement. From this decision two propositions of law can be deduced: (1) that the court expressly holds that slight intoxication of the promisor does not affect the validity of his promise. (2) By implication the court holds that the fact that the promisee as an infant is not bound by his promise does not affect his power to enforce an otherwise valid promise of an adult.

But to justify the deduction of a rule of law by implication from a case it must appear that an issue was raised before the court upon which the implication can be predicated. Suppose that A sues B, an infant, on a promise, and that in the lower court, B defended solely on the ground that he was induced by fraud to make the promise. An affirmation of this ruling by an appellate court on the ground that no fraud was shown by B does not decide by implication that a promise by an infant is binding, because that question was never in issue before the court.

Again, it may happen that several issues have been raised in a given case, the decision of any one of which would be sufficient to dispose of the controversy. Under such circumstances the court is under no obligation to pass upon more than one. If, however, the court proceeds to answer all the issues, but chooses to rest its conclusion on one, what it says on all others will be mere dicta. If the court does not indicate that it rests its final judgment on any one, a rule of law may be crystallized from each issue considered. In the case of *Stamper* v. *Temple*, 6 Humph. Tenn. 113, it appeared that the defendant, in a moment of great excitement, stated that he would pay $200 to anyone apprehending a certain criminal. The plaintiff, ignorant of what the defendant had said, in the performance of his public duties as an officer, apprehended the criminal, and sued to recover the $200. Three issues were raised at the trial of the case: (1) Was there an offer under the circumstances stated? (2) Can a public officer recover a reward for the performance of his duty? (3) Can one ignorant of an offer accept it? A negative answer to any one of these issues thus raised would have settled the controversy. But the court chose to answer all three negatively. As it did not indicate that it was resting its decision of the controversy on any one issue to the exclusion of the others, three rules of law can be deduced from the case, one from each issue considered.

The task of formulating and stating the doctrine of law deducible from a case is more or less a summary of what has been already said. In the first place, all dicta must be ignored. However sound and just they may seem, and however good law they may be in other connections, they form no part of the decision at hand and should not be considered as any part of its doctrine. In the second place, set down as a rule of law for the case everything which the court decides expressly or by necessary implication. The student, however, must be warned that no rule of law can be implied from a decision in which no issue was raised upon which the implication can be predicated. In the third place, a rule of law may be deduced from every issue raised and passed upon by the court, even though the decision of only one issue might have been sufficient to dispose of the controversy, unless, indeed, the court has indicated that it rests its decision of the whole controversy on its answer to one issue only. In this event the rule of law must be taken from the answer to the one issue. Finally, constant care must be exercised to state the doctrine neither too broadly nor too narrowly. The exercise of this

care involves nice discriminations between facts which are material and those which are immaterial.

By the way of illustration and discussion of what is meant in the foregoing paragraph, consider a simple case. A court decides that Jones cannot recover $100 promised him as a gift from Smith. It is pretty obvious in this decision that the names and occupations of the parties are immaterial and need not be incorporated into the rule of law, which tentatively may be stated, a gratuitous promise to pay $100 is not enforcible. Presumably the amount of money is not material and the rule may be stated: *a gratuitous promise to pay money is not enforcible.* Conceivably the rule may be further broadened by saying that a gratuitous promise is not enforcible. But before generalizing to this extent, it would probably be better to examine cases where other gratuitous promises of one kind and another have been held unenforcible. Of course, if the decisions assumed were the only ones on gratuitous promises, one might reason by analogy from it that all gratuitous promises are unenforcible, but the decision *per se* does not decide that much.

In the beginning courts in handing down decisions typically proceeded from point to point. Generalizations were not drawn until many decided cases justified them. One studying cases should in the beginning proceed in like manner. In searching for the rule of law in a case, a student should not, and at first ordinarily cannot, posit some generalization as the foundation of the case and deduce the particular rule from the decision. He should rather examine cases individually, discovering the rule in each case, and then only should he attempt to indulge in generalizations.

But the study is not complete when the rule of law from a decision has been discovered and stated. It is then necessary to determine how much weight can be given it. A variety of factors may affect the decision, in so far as it may be relied upon as a precedent. These factors may be intrinsic or extrinsic.

Intriniscally a decision is and can be no stronger than the reasoning of the court which pronounced it. It may very well be that the result reached in a given case is a desirable one, it may be that the decision is in accord with previous decisions, but if the court's reasoning is fallacious, obviously the decision can never be as strong for the rule of law it purports to lay down as if the court's logic had been without flaw. If the court, in its analysis of the facts, has placed a wrong interpretation on them, has unduly emphasized certain ones,

or has entirely ignored others, the decision is vulnerable as a precedent. No definite rules, peculiar to law or the study of cases, can be laid down by which weaknesses of this character in the court's reasoning can be detected. Such fallacies can be exposed by the application of the ordinary tests of logic and common sense.

Where the court has decided some point by implication, the decision will be a precedent for the point decided, but it cannot be as strong as if the court had given it full consideration. The failure to consider the question or issue under such circumstances does not take away its characteristic as a doctrine of the case, but does reflect upon its potency as a precedent. What is here said is equally applicable to a situation where the court has delivered no opinion at all.

Again, the decision may be intrinsically weak because of the court's misunderstanding and application of some rule of law which it purports to follow. Suppose that A makes a promissory note to B, promising to give her at a future date the sum of $2,000, because he does not want her to work any more. In reliance upon this promise B ceases to work. In an action upon the note the court permits a recovery and bases its decision on the ground of estoppel. Estoppel, as defined in the cases, narrowly stated, means that if a person has made a statement of past or present fact, upon which one has reasonably relied to one's hurt, the former will be compelled to live up to the statement. But in this case there was no statement of past or present fact: it was a promissory statement of future conduct. The result reached by the court may be desirable but the reasoning of the court is at fault because of the court's misunderstanding of what constitutes estoppel. Under the circumstances the case is not a strong precedent for the result reached, regardless of how desirable it may be and regardless of the fact that the decision might have been sustained on some other theory.

A decision may be weakened by the presence of certain extrinsic factors as well as by intrinsic ones. In the first place, it may appear extrinsically that the decision was made in the settlement of a more or less friendly controversy. As was stated in another connection, courts are not established to decide hypothetical cases or settle friendly controversies; but it is not always easy or possible for a court to know the real character of the proceedings before it. It may very well be that there is a semblance of a controversy between the parties, but that both parties are anxious for one and the same result; or it may be that they are indifferent to the actual decision

and are desirous simply of securing some kind of ruling by a judicial tribunal. Closely akin to such semi-hypothetical controversies are *ex parte* proceedings, in which only one side is represented before the court. In none of the foregoing instances are the issues likely to be tightly drawn and hotly contested. As a result it may happen that the court's mind is not properly fertilized, cultivated, and prepared for the enunciation of a strong, impregnable decision.

In the second place, it may be that the court in deciding a given controversy was swayed by some religious, social, or political bias, the influence of which it was unable to throw off in its deliberations. If one knows that a given judge or court has an inborn hatred of a given institution, custom, theory, or movement, one cannot but have a lurking suspicion that a decision adverse to the subject-matter might be stronger if coming from an impartial court with an open, receptive mind. But if the court permits its bias to creep in and permeate its opinion, as is frequently the case, obviously the decision is open to violent attack.

In the next place, a decision may be weakened by lack of unanimity of the court in handing it down. If one member of the court delivers a vigorous dissent from the view of the majority, this will to a greater or lesser degree reflect upon the decision. It is true, of course, that the dissent is strong only as it points out weaknesses in the reasoning of the majority of the court. Any decision is open to this kind of an attack and is always subject to criticism because of faulty reasoning. But the fact that there is so much doubt about the conclusion that one judge cannot agree with the majority makes the decision much weaker than if he had meekly acquiesced in the result reached by the rest of the court. If two of five judges dissent the suspicion that something is wrong with the decision becomes more insistent. If a controversy comes before a court of equal number, and the court is equally divided, as two for reversal and two for affirming, the decision of the lower court is automatically affirmed. A decision reached under such circumstances loses greatly in value as a precedent because of the complete lack of unanimity in the court.

A situation closely akin to that mentioned in the last paragraph is one where there is agreement as to the result reached but disagreement as to the principle upon which the result is reached. If, for instance, in the case of *Stamper* v. *Temper*, cited *supra*, one judge had maintained that there was an offer but that there had been no acceptance, and another had said that there might have been both offer

and acceptance but that it would be against public policy to permit an officer to recover a reward for performing a public duty, the decision *per se* would not be particularly valuable for any doctrine. That formal judgment was given for the defendant is clear, but why it was given or what rule of law the case stands for, are questions which cannot be answered from a study of the decision.

Finally, a decision may be weak because it is a case of first impression. By this is meant that the principle announced is an innovation in the law. The result reached may be one altogether desirable, the abstract reasoning of the court may be irrefutable, but in the law, the mere fact that it is something novel and unprecedented casts doubt and suspicion upon it. A court decides that a person has a right to privacy, and that he can enjoin another from making a photograph of him and using it for advertising purposes. This may be an eminently just result from a popular viewpoint, and yet, because it is something new in the law, it is looked upon askance and with suspicion by commentators and courts. Whether this is a proper attitude or not, the fact remains that a decision of first impression in the beginning enjoys a precarious tenure as a precedent.

In conclusion, concerning extrinsic factors which may influence or affect decisions, this is to be said: these things do not go to the essence of the decision. If the result reached is just, if the reasoning of the case is sound, and if the case is in accord with previous decisions, typically these external factors should not be taken too seriously. It is only when there are serious intrinsic defects in the case that these extrinsic imperfections should be given much weight.

The final question to be asked and answered in the study of a case is, how does this decision accord with the decisions which have gone before it? The theory of the common law system, that each decision of a court is a precedent for itself and subordinate courts in the future, makes this inquiry necessary. The conclusion of the court may be abstractly desirable, its intrinsic reasoning may be without flaws, but unless it is in accord with other decisions by which the court is bound, the decision must be regarded as wrong, unless the court can show some good and sufficient reason for its non-observance of precedents.

In seeking for the rule of law laid down in an individual case, the process should be inductive. The decision should be reduced to its lowest terms or narrowest limits, and no generalizations indulged in until a sufficient number of cases have been examined to justify

generalizations. However, in determining whether an individual decision or rule of law is in accord with the precedents the process is more or less deductive in character. Having the general rules laid down by previous decisions in mind, the kind of question which must now be answered is: Can the rule in this case be made to fit into the general scheme of jurisprudence?

It is frequently said that a court must decide a given controversy in accordance with a general principle of law, without which general principle of law, the decision of the court must have been otherwise. But there must have been a time when such a theory would have meant nothing, unless, indeed, it can be assumed that these general principles existed from the beginning, and antedated decisions. As a matter of fact, whatever may be the theory, decisions on particular points came first, and general principles came afterwards. But in the present stage of the development of the law, such a working hypothesis is helpful, and probably necessary, in determining whether a court is following the precedent by which it is bound.

In the application of this hypothesis the student of cases must have in mind the general principles of law already established. In most cases the court will state in its own language, or quote from some writer or from previous cases, that which, in its opinion, constitutes the general principle of law governing the controversy before it. Where the court thus lays down its general rule, unless one can examine and test the cases which are supposed to establish the principle, one simply has to assume its existence and validity. Less frequently courts do not, in their opinions, state expressly a general rule of law governing the controversy. In this event the student, with no considerable background of law, can do little or nothing in fitting the decision into the general scheme of jurisprudence already established.

How can one determine whether a given decision is in accord with some known or assumed principle of law? State the general principle, known or assumed, as a major premise of a syllogism. State as a minor premise the material facts of the controversy under consideration. As a precautionary measure it may be desirable to state a negative minor premise that all other facts of the case are legally immaterial. From the premises thus set up, draw a conclusion. Compare the conclusion and the rule of law deduced from the case. If the conclusion and the rule assumed are the same in content, the decision is not in conflict with the general principle.

By way of illustration, A agrees to sell B a haycock standing on A's land for $30, to be paid for in thirty days. By the terms of the agreement B is given the right to take away the hay when he desires. But before he does so, the haycock burns without the fault of either party. At the expiration of the thirty days, A brings an action for the purchase price. In order to determine upon whom the loss falls, the court must decide when the title to the property passed. The court holds that title passed at the time the agreement was made. Now let us test this decision in the manner suggested in the foregoing paragraph. State as a major premise this assumption: "Where nothing remains to be done by either party to a contract of sale of personal property before delivery, either to determine the identity of the thing sold, the quantity, or the price, the general rule is that the title passes when the agreement is made, in the absence of an agreement to the contrary." State as a minor premise the following material facts of the case at hand: "Nothing in this case remained to be done by either party before the delivery of the property to identify it, to determine the quantity, or to fix the price, nor was there any agreement as to when title should pass." By way of precaution against overlooking material facts, it may be stated: "The facts that the haycock stood on A's land, that it was not yet carried away by B, that the price had not yet been paid, are not material." The conclusion then follows: "Therefore title passed when the agreement was made, and the loss falls upon the buyer." A comparison of the conclusion and the decision shows that in content they are the same. This means that the decision actually reached by the court is in accord with the general principle assumed.

C

After having studied a case in the light of the principles laid down in the foregoing reading, the student should always make a brief, written digest of it. This is desirable for several reasons. It forces the student to crystallize in writing his own interpretation of the decision. It is a valuable aid to the student if called upon in the classroom to discuss the case. The digest will prove a great economy in time when he comes to review the cases which have been discussed in the course of study.

The student should follow a standard form as far as possible in the preparation of his digests. He should be warned, however, that any form is but a means to an end and not an end unto itself. On

the other hand, he will find that much time and effort will be saved if he will digest each case according to some standard form.

In the course of time the student will gain facility in the preparation of his digests and there will no doubt evolve a form which best fits his individual needs. There are, however, certain suggestions which can be thrown out here which will be of great assistance to the student just beginning the study of cases. These suggestions are only suggestions and should not be taken too seriously. But they do indicate what a good digest should contain; and they do indicate one way in which the content of the digest may be arranged.

(1) The name of the case, the date, and citation of the decision, and possibly the court in which the case was decided, should be included in the heading or caption of the digest. This information frequently becomes material in the discussion of the decision and should be available for ready reference. (2) Following the caption should be a clear, concise narration of all the material facts of the controversy. In the beginning the student will be inclined to overstate the facts, because he will not yet have acquired sufficient experiental background in dealing with facts to guide him in including the essential and excluding the unessential. He should make it a practice to weigh every fact and ask himself whether, in the light of his understanding of the controversy, it is necessary for a determination of the issue or issues involved. (3) After he has stated the facts, he should then make a summary of the pleadings, if they appear in the case. What was the form of action? Was it debt or deceit? Was it trover or trespass? Was it ejectment or assumpsit? In what way did the opposing party defend? Did he answer or did he demur? An analysis of the pleading in this manner will greatly assist the student in determining the precise issue or issues of the controversy. (4) Following the summary of the pleading should be a statement of the issue or issues which were reached and presented for trial. If the exact issue or issues are discovered and stated the student is much more likely to be correct in his conclusion as to the decision of the court. (5) Then the student should state how the lower court decided the issue or issues involved; and whether judgment was given for the plaintiff or the defendant. (6) Next in order should appear how the case was taken to the appellate court and what ruling or rulings of the lower court were assigned as errors. (7) After this the decision of the appellate court should be given in terms of its formal judgment, as "Judgment for the plaintiff affirmed," "Judg-

ment for the defendant reversed and a new trial ordered," or "Exceptions overruled." (8) The student is then in position to deduce and state the rule of law for which he conceives the case stands. (9) After this he may profitably set down the reasons which the court gave in the opinion in support of its conclusion. (10) Finally, some students find it helpful and desirable to incorporate into their digests, rules which the court announced to be good law, even though their enunciation was not necessary for the determination of the issue or issues presented by the pleadings for consideration.

QUESTIONS

1. What is the justification for the study of cases?
2. Is a decision law or simply evidence of law?
3. What is the doctrine of *stare decisis?* What is the justification for the doctrine? What bearing does it have upon the study of cases?
4. What is the doctrine of *res adjudicata?* Compare it with the doctrine of *stare decisis.*
5. Suppose that a court reverses a decision, what happens to the rights which have grown up in reliance upon the decision?
6. Why does a court refuse to pass upon hypothetical questions or cases?
7. What is the purpose of the opinion of the court? What aid does it give one in searching for the doctrine of a case?
8. Outline the steps necessary in determining what rule of law a given case stands for.
9. What is a *dictum?* What weight is to be given to a *dictum?*
10. P sues D upon a promise to make the former a gift of $500. D demurs to P's declaration. (*a*) What kind of issue is raised? (*b*) How should it be decided? (*c*) What rule of law can be deduced from the decision of the issue?
11. What various factors may enter into the weight which is to be given a decision?
12. How can one determine whether a given decision is in accord with past decisions?
13. "Reasoning from analogy, one case or a series of cases may constitute a precedent for a subsequent decision even though there is no case on 'all fours' with the case under consideration." What is meant by this statement?
14. What is a digest of a decision? How should it be prepared? What should appear in a digest? How should the content of a digest be arranged?

CHAPTER II

PERSONS

I. Introductory Topics

A

In every decision enunciated by a court the existence of legal personality is recognized either expressly or by implication. It is through the recognition of legal personality that the elaborate system of rules which makes up the body of our law is worked out. Persons are the repositories of rights and duties. Accordingly, a person may be defined as that in which the law recognizes rights and upon which it imposes duties. It recognizes rights to the end that the person's various interests may be protected; it imposes duties to the end that the interests of other persons may be protected.

Persons may be classified as natural and juristic persons. Natural persons are human beings, possessed of rights and subject to duties. There was a time in the history of our law when persons and human beings were not synonymous. A slave, for instance, was a human being but was not considered a person in law. Since property in human beings is no longer recognized by law, it can be said categorically that a human being is a person.

Natural persons are either normal or defective. Normal persons are those who, under the same or similar circumstances, are possessed of the same rights and subject to the same duties. Ordinarily, no difficulties peculiar to legal personality are encountered in adjusting the rights and duties of this class of persons.

Defective persons are those human beings whose rights and duties have been modified by law for reasons of policy or because of some natural or acquired disability. These modifications may be enabling or they may be disabling. They are of an enabling character where the law has attempted to equalize the bargaining relation between a defective person and a normal person. The infant, says the law, is no match for a mature man in the making of contracts; the infant must, therefore, be placed in a superior bargaining position; or to state the same thing in other words, the adult in dealing with the infant must be handicapped. On the other hand, these modifications

may be of a disabling character. For example, for reasons of policy, to a certain extent an alien, and especially an alien enemy, is handicapped in his dealings with a subject.

A juristic person is a thing or organization so personified by law that it is given rights and subjected to duties. A corporation, for instance, is regarded by the law as a person and for many purposes is treated as a natural person. Its rights and duties are quite distinct from those of the aggregate of natural persons which really makes it up. Obviously enough, to think of it as a person is a fiction of law; but it is highly useful fiction and is created for commercial convenience as will be seen when business associations are considered.

Juristic persons are either perfect or imperfect. A perfect juristic person is one which has complied with all mandatory requirement prescribed by law for its existence. An imperfect juristic person is one which has not complied so fully with the requirements of law, but which has so nearly met the letter of the law that the state alone can challenge its existence.

B[1]

The ages of male and female are different for different purposes. A male, at twelve years old, may take the oath of allegiance; at fourteen, is at age of discretion, and therefore may consent or disagree to marriage, may choose his guardian, and, if his discretion be actually proved, may make his testament of his personal estate; at seventeen may be executor; and at twenty-one is at his own disposal, and may alien his goods, lands, and chattels. A female also at seven years of age may be betrothed or given in marriage; at nine is entitled to dower; at twelve is at years of maturity, and therefore may consent or disagree to marriage, and, if proved to have sufficient discretion, may bequeath her personal estate; at fourteen is at legal discretion, and may choose a guardian; at seventeen may be executrix; at twenty-one may dispose of herself and her lands. So that full age in male and female is twenty-one years, which age is completed on the day preceding the anniversary of a person's birth; who till that time is an infant, and so styled in law. Among the ancient Greeks and Romans women were never of age, but subjected to perpetual guardianship unless when married, *nisi convenissent in manum viri;* and, when that perpetual tutelage wore away in process of time, we find that, in females as well as males, full age was not until

[1] From 1 Blackstone, *Commentaries on the Laws of England*, p. 464.

twenty-five years. Thus by the constitution of different kingdoms, this period, which is merely arbitrary and *juris positivi*, is fixed at different times. Scotland agrees with England in this point (both probably copying from the old Saxon constitutions on the Continent, which extended the age of minority "*ad annum vegesimum, primum, et so usque juvenes sub tutelam reponuni*"); but in Naples they are of full age at eighteen; in France, with regard to marriage, not till thirty and in Holland at twenty-five.

QUESTIONS

1. What is a person? A natural person? An artificial person? A juristic person?
2. Why is a corporation called a person? Is a partnership a person of the same kind?
3. What is the difference between a person and a citizen?
4. For the purpose of making contracts, when does a person reach his majority?
5. D was born on January 5, 1900. Assuming twenty-one to be years of majority, at what moment does D cease to be a minor?
6. Examine the statutes of some state in which you are interested, and make a brief digest of provisions relating to capacity of persons.

2. Defective Persons

COURSOLLE *v.* WEYERHAUSER

69 Minnesota Reports 328 (1897)

MITCHELL, J. The rule is that the act to be ratified must be voidable merely, and not absolutely void; and the question remains—which to our minds is the most important one in the case—whether the act of a minor in appointing an agent or attorney is wholly void, or merely voidable. Formerly the acts and contracts of infants were held either void, or merely voidable, depending on whether they were necessarily prejudicial to their interests, or were or might be beneficial to them. This threw upon the courts the burden of deciding in each particular case whether the act in question was necessarily prejudicial to the infant. Latterly, the courts have refused to take this responsibility, on the ground, that, if the infant wishes to determine the question for himself on arriving at his majority, he should be allowed to do so, and that he is sufficiently protected by his right of avoidance. Hence the almost universal modern doctrine is that all the acts and contracts of an infant are merely voidable.

Upon this rule, there seems to have been ingrafted the exception that the act of an infant in appointing an agent or attorney, and consequently all acts and contracts of the agent or attorney, under such appointment, are absolutely void.

This exception does not seem to be founded on any sound principle, and all the text writers and courts who have discussed the subject have, so far as we can discover, conceded such to be the fact. On principle, we think the power of attorney of an infant, and the acts and contracts made under it, should stand on the same footing as any other act or contract, and should be considered voidable in the same manner as his personal acts and contract are considered voidable. If the conveyance of land by an infant personally, who is of imperfect capacity, is only voidable, as is the law, it is difficult to see why this conveyance made through an attorney of perfect capacity should be held absolutely void. It is a noticeable fact that nearly all the cases cited in support of this exception to the general rule are cases of technical warrants of attorney to appear in court and to confess judgment. In these cases the courts hold that they would always set aside the judgment at the instance of the infant, but we do not find that any of them go as far that the judgment is good for no purpose and at no time. The courts have from time to time made so many exceptions to the exception itself that there seems to be very little left of it, unless it be in cases of powers of attorney required to be under seal, and warrants of attorney to appear and confess judgment in court. See Freeman's note to *Craig* v. *Van Bebber*, 18 Am. St. Rep. 629; Bish. Cont. par. 930; Metc. Cont. (2d Ed.) 48; *Whitney* v. *Dutch*, 14 Mass. 457–463; *Bool* v. *Mix* 17 Wnd. 119–131. Hence, notwithstanding numerous general statements in the books to the contrary, we feel at liberty to hold, in accordance with what we deem sound principle, that the powers of attorney were not absolutely void because of plaintiff's infancy, but merely voidable, and that they were ratified by him after attaining his majority.

QUESTIONS

1. Can an infant hold a public office? Can he sue or be sued in his own name? Has he the capacity to testify as a witness?
2. At what moment does an infant become of age?
3. I, an infant, enters into an agreement with A to perform services for the latter, for a period of three months. What is the effect of the agreement? Why should this be so?

4. I, an infant, contracts to sell land to A. What is the effect of the transaction? I appoints X to sell the land to A. What is the effect of his act of appointing X as agent?
5. I make a contract for P with T. T refuses to perform the contract when he discovers that I is an infant. Is his objection valid?

TOWLE *v.* DRESSER

73 Maine Reports 252 (1882)

BARROWS, J. Trover for a horse. The following facts may be regarded as established by the testimony here reported.

In October, 1876, being then minors aged respectively eighteen and sixteen years, the plaintiffs sold and delivered at their own house their colt to the defendants residing in a distant county receiving therefor two promissory notes of one of their own townsmen, amounting to two hundred dollars, payable to the defendants, or bearer, and indorsed by one of the defendants. The following summer one of the notes having become due and remaining unpaid, an attorney at law, employed by the plaintiffs, with the assent of their father, went with the notes which he tendered to each of the defendants and demanded the colt. The defendants refused to receive the notes, or return the colt, and thereupon this suit was instituted, October 9, 1877, their father appearing as *prochein ami*, never having been appointed their legal guardian. The defendants severally pleaded the general issue, with brief statements, asserting that the sale was made as above to one of them; that it was never legally rescinded, nor any tender of the notes made to, or legal demand for the restoration of the colt upon either of them, and denying the refusal to return or the conversion. The notes were placed upon the clerk's files for the use of the defendants and their atttorney notified of the facts. A nonsuit having been ordered the question is, whether upon the above facts the action is maintainable, and this involves the inquiry: 1. Whether minors can rescind an executed sale of their personal property during their minority? 2. Whether they can notify the vendee of their election to rescind, offer to return the consideration, and demand a restoration of their property by an agent? 3. Whether if the response to such notification, offer and demand is a simple refusal by the vendee to accept the return of the consideration and to restore the property, without objection on the ground of want of authority in the agent or to make the demand, it would be competent for the jury

to find a waiver on the part of the vendee of any possible defect in the demand on that score, and a conversion by him accordingly.

As to the power of minors to rescind an executed sale of their personal property during minority upon returning the consideration received. We find no good reason either upon principle or authority to deny that power. It is the legitimate use of the shield with which the law covers their supposed want of judgment and experience, and places both parties *in statu quo ante*, a condition of things of which it would seem neither ought to complain. By reason of the transitory nature of personal property, to withhold his right from the infant, perhaps for a term of years, until he became of age, would, in many cases, be to make it entirely valueless.

In support of their denial of its existence, defendants rely upon *Roof* v. *Stafford* 7 Cowen 179, and the dictum of a former learned judge justice of this court, in *Boody* v. *McKenny*, 23, Maine, 525.

The case in 7 Cow. 179 was reversed on appeal, *Stafford* v. *Roof*, 9 Cowen, 626, where it was held that although he could not avoid a conveyance of land until he became of age, he might a sale of chattels. The power is expressly recognized in *Shipman* v. *Horton*, 17 Conn. 483; *Carr* v. *Clough*, 26 N.H. 280, 293.

And this is the principle upon which alone the numerous class of cases proceed in which the minor after he has worked for a man has been allowed to repudiate his contract to labor for a fixed period of time at a certain rate of wages, and to recover by suit through the intervention of a next friend what his work was fully worth without regard to his stipulations. For illustration see *Judkins* v. *Walker*, 17 Maine, 38; *Derocher* v. *Continental Mills*, 58 Maine, 217; *Boynton* v. *Clay*, id. 236; *Vehue* v. *Pinkham*, 60 Maine, 142.

The learned judge who uttered the dictum in *Boody* v. *McKenney*, 23 Maine, 525, would never have recognized it as an authority or decision of the point. It was purely a dictum, put forth, apparently on the strength of the case in 7 Cowen, 179, in discussion of the decided cases for the purposes of seeing how far the remarks in them were capable of being harmonized. See Ibid., p. 525. Defendants' counsel cannot expect us to give it more credit than he would have us give to *Hardy* v. *Waters*, 38 Maine, 450, against which he so stoutly contends.

But this last named case was—we think—rightly decided, and it stamps as inaccurate and unsound all dicta or decisions (if such there be) which hold all acts done and contracts executed by an infant through the intervention of an agent void, and on the contrary,

relegates the appointment of agents (for certain purposes at least) by them to the class of voidable contracts to be disposed of by the rules applicable to that class. And it recognizes the cardinal principle that in relation to all voidable acts and contracts, infancy is a personal privilege which no one but the infant or his legal representative is entitled to assert.

The exceptions must be sustained. Nonsuit set aside; new trial granted.

QUESTIONS

1. What is meant by the expression, "Trover for a horse"?
2. What is meant by the statement that the father of the plaintiffs appeared *prochein ami?*
3. The lower court nonsuited the plaintiffs. What is meant by this?
4. The court speaks of a dictum in a certain case. What does the court mean by this?
5. I, at sixteen, sells his horse to D for $250. Six months later he offers to return the money and demands possession of the horse. In an action by I against D for the horse, D makes two contentions: (*a*) That I should not be permitted to rescind the transaction at all. (*b*) That if permitted to rescind, he should not be permitted to do so until he reaches his majority. What decision?
6. I, during minority, sells Blackacre to D for $5,000. Before he reaches his majority, I tenders back the purchase price and asks for a reconveyance of his land. D refuses to reconvey and I brings this action in a court of equity asking that D be compelled to reconvey. D contends that in no event should he be permitted to rescind until he reaches his majority. What decision?
7. I is seeking to enforce a promise of D. D contends that he should not be held to his promise since I cannot be held to his. Is D's contention well taken?
8. P is suing D for enticing away a servant. D defends on the ground that the servant was a minor and not bound by his contract of employment. What decision?
9. I entered into a contract to sell Blackacre to D and afterwards assigned the contract to B. B wishes to disaffirm the contract. May he do so?
10. I in the foregoing case dies. What becomes of the contract? May it then be rescinded?

TOBEY *v.* WOOD

123 Massachusetts Reports 88 (1877)

MORTON, J. This is an action of contract upon two checks, dated respectively, December 2, 1872, and January 3, 1873, signed

by Seth Wood & Co., and duly presented for payment and protested for non-payment.

The defendant Humes, the only one of the signers who defends the action, was a member of the firm Seth Wood & Co., and when the checks were drawn was an infant. His promise to pay the checks, therefore, was a voidable contract, and the burden of proof is upon the plaintiff to show that Humes after he became of age, affirmed and ratified the contract. 2 Greenl. Ev. sec. 367, and cases cited. *Reed* v. *Batchelder* 1 Met. 559. Such ratification may be shown, either by proof of an express promise to pay the debt, made by the infant after he became of age (which is not claimed in this case), or by proofs of such acts of the infant, after he became of age, as fairly and justly lead to the inference that he intended to ratify the contract and pay the debt. *Boody* v. *McKenney*, 23 Me, 517; *Proctor* v. *Sears*, 4 Allen, 95; *Thompson* v. *Lay*, 4 Pick, 48; *Pierce* v. *Tobey*, 5 Met. 168; *Duclin & Wicklow Railway* v. *Black*, 8 Exch. 181; sec. 16 Eng. L. & Ec. 558 and note.

The plaintiff contends that the facts in this case justify the findings that the defendant Humes intended to and did ratify his promise to pay these checks. These facts are, that a portion of the goods which formed the consideration of the checks remained unsold up to the time of the dissolution of the firm, which was seven weeks after Humes became of age; that during said seven weeks he drew money for his personal use, from time to time, from the firm. It is also agreed that, at the time Humes became of age, and until after the dissolution, he supposed that these checks were paid.

It has often been held that, if an infant purchase property, and, after he becomes of age, retains specifically the property, and uses or disposes of it, it may be an affirmance of the contact by which he acquired it, and deprive him of the right to avoid. *Chandler* v. *Simmons*, 97 Mass. 508, and cases cited. This is upon the ground that he can honestly retain the goods only upon the assumption that the contract by which he acquired them was valid, and therefore his retention and use of them, if unexplained, justly leads to the inference of a promise or undertaking to pay for them, after his incapacity to make contracts is removed. *Todd* v. *Clapp*, 118 Mass. 495.

But this rule cannot apply in the present case, because it is not shown that Humes knew that any of the goods which were the consideration of the checks, remained undisposed of at the time he became of age, and it is shown that he supposed that the checks had been

paid. Under these circumstances, there is no foundation for an inference of a promise by him to pay the checks. *Smith* v. *Kelly*, 13 Met. 309.

The facts that Humes remained in the firm for several weeks after he became of age, drawing money from time to time, for his personal use, and that when he retired he took an agreement from his partners that they would pay all debts of the firm, are relied upon by the plaintiff as showing an affirmance of the checks. But we are of opinion that these facts do not afford sufficient proof of such affirmance. In this connection it must be borne in mind that Humes supposed these checks to have been paid. In the absence of an express promise to pay, an affirmance can only be shown by unequivocal acts of the defendant, after he became capable of contracting, which shows his intention to pay the debt. How far these acts of Humes might show an intention on his part to ratify such debts of the firm as were within his knowledge, need not be considered. It would be forced and unreasonable to infer from them an intention and promise to pay a debt which he supposed had already been paid. *Crabtree* v. *May*, 1B. Mon. 289; *Minoch* v. *Shortridge*, 21 Mich. 304; *Dana* v. *Stearns*, 3 Cush. 372.

It is argued that the taking of an agreement of indemnity from his partners implies that he was liable for the debts of the firm, and is therefore evidence of a promise to ratify and pay such debts. This is not necessarily so. The contract of indemnity may have been necessary for his protection against debts of the firm contracted after he became of age. But if this act is to be regarded as evidence that he supposed himself liable for all debts of the firm, it is not of itself sufficient proof of a ratification. The act relied on as ratification of a promise made during infancy must amount to, or be sufficient evidence of, a promise or undertaking to pay the debt. *Smith* v. *Kelly*, 13 Met. 309.

Perhaps if an infant member of the firm should, after he became of age, buy out his partners, take the property of the firm, and agree to pay all the debts of the firm, this might amount to a ratification of his promise to pay all the firm debts whether known or unknown to him. It would be a clear expression of his intention and undertaking, after he became competent to bind himself, to affirm and to pay such debts. But taking from his partners a promise that they will pay the debts does not imply an intention on his part to pay them. It implies that he desires and expects that they will pay the debts, and is

as consistent with an intention on his part to avail himself of the defence of infancy, as of the intention to waive the privilege. Upon the whole case, we are of the opinion that the facts do not justify a finding that the defendant Humes, after he became of age, ratified or promised to pay the checks in suit.

Judgment for the defendant Humes.

QUESTIONS

1. What was the issue involved in the principal case? How was it decided? What rule of law can be deduced from this decision?
2. Why was the infant not held upon these checks?
3. What evidence was there in this case that the infant ever intended to ratify his obligation on the checks?
4. Suppose in the principal case that the infant had known when he reached his majority that the checks had not been paid, and that he had continued to draw money from the firm, would the decision have been the same?
5. Suppose that the infant had bought out all the other partners and had agreed to pay all firm debts, would that have amounted to a ratification of his obligation on the checks, even though he supposed that the checks had been paid?
6. During his minorty I executed a note to P. After reaching his majority he promised to pay it. Is this promise a ratification? Will action by the holder of the note be brought on the note or on the new promise?
7. In the foregoing case, I merely acknowledges that the note was executed by him but makes no promise to pay it. The holder brings an action against him on the note. What decision?
8. In Question 6, after reaching his majority, I pays interest on the note at the request of the holder. Thereafter the holder brings an action on the note against I. What decision?
9. During his minority, I executes and delivers to P a note. The note matures before he reaches his majority but is not presented for payment. Three years after he reaches his majority, the note is presented to him for payment for the first time. He refuses to pay the note. The holder brings an action on the note against him. What decision?
10. I purchased a horse when a minor. After he reached his majority, he continued to use the horse for about six months. He then offered to return the horse to D, from whom he bought it, and demanded back the purchase price. D refused to return the money. This is an action for it. What decision?
11. What is meant by ratification? How is it proved?

SCRANTON *v.* STEWART

52 Indiana Reports 68 (1875)

Action by the appellant to recover possession of certain real estate on the ground that when she and her husband conveyed the same to Stewart, the appellee, she was an infant and a *feme covert.* The appellee, among other defenses, relied on a ratification of the contract by the appellant after her arrival at her majority. Appellant proved that within three and a half years after reaching her majority she gave written notice to the appellee that she disaffirmed the sale.

A verdict was returned for the appellee; the appellant moved for a new trial which was denied; a judgment was entered on the verdict.

BUSKIRK, C. J. We proceed to the examination of the second proposition stated. There is a well defined distinction between the acts to be done by the infant on arriving at age, where the contract is executory, and where it is executed. When the contract is executory, such as a promise to pay money, the infant must, to render him liable thereon, on arriving at full age, expressly ratify it, and expressly promise to pay it. When the act is executed, as where a deed has been made, the infant must, on arriving at full age, do some act to disaffirm the contract. In other words, where the contract is executory, there must be an affirmance to render the contract valid; when it is executed, there must be a disaffirmance to avoid the operation of the deed. *Fetrow* v. *Wiseman*, 40 Indiana 148; *Law* v. *Long*, 41 Ind. 586. The deed of the appellant to the appellee, being voidable merely, vested the title to the land in the appellee, subject to the right of disaffirmance on arriving at age, and the title remained vested in the grantee, until divested by some act of the maker of the deed. In *Miles* v. *Lingerman*, 24 Ind. 385, it was said: "Under our present statute, the wife may bring her action in regard to her own estate as though she were a *feme sole;* still our legislature has seen proper to continue the protection formerly accorded to her as a *feme covert*, although, as to her power to disaffirm her contracts made during minority, her legal disability has been removed. She has the legal power to disaffirm her contracts made during infancy, and to bring her action without assent, and even against the will of her husband. But the legislature has not required her to exercise that power during coverture."

If the word "power" in the last sentence is limited to her bringing of the action, it correctly states the law; but if it embraces the dis-

affirmance of the contract, then it is not the law. Upon a careful review of the authorities and upon full consideration, it was held in *Law* v. *Long*, supra, that an infant *feme covert* who had made a conveyance of her lands during infancy was required to disaffirm such conveyance within a reasonable time after arriving at full age. The well defined distinction between laying the foundation to bring an action and the actual bringing of the action, as laid down in *Potter* v. *Smith*, 36 Ind. 231, was reaffirmed. We think the appellant was required to disaffirm her conveyance within a reasonable time after she arrived at full age. The appellant, within three years and a half after arriving of age, gave to the appellee written notice that she disaffirmed the contract. This was a proper mode of disaffirming. Entry is not required. The disaffirmance must precede the bringing of the action. *Law* v. *Long* supra. Was the notice given in reasonable time? In *Doe* v. *Abernathy*, 7 Blackf. 442, it was held that five years was within a reasonable time. In *Hartman* v. *Kendall*, 4 Ind. 403, it was held that thirteen years was an unreasonable delay. In *Law* v. *Long*, supra, it was said that the authorities all agree that the contract must be disaffirmed within a "reasonable time" after the infant arrives at age, but there is great diversity of opinion as to what is a "reasonable time." An examination of the above authorities will show that the time required ranges from one to twenty years, according to the peculiar circumstances of each case and the views of the different judges and writers.

We think the disaffirmance was within a reasonable time.

Judgment reversed.

QUESTIONS

1. What were the issues involved in the principal case? How were they decided? What rules of law can be deduced from this case?
2. What is the difference between an executed and an executory transaction?
3. Was the infant's promise on the checks in *Tobey* v. *Wood*, page 88, executed or executory?
4. Consider Question 10 on page 91. Is the contract executed or executory? Is ratification or disaffirmance in issue?
5. I during his minority sold and delivered a horse to D and received the purchase price. Is this transaction executed or executory? Can I disaffirm this contract before reaching his majority? Can he disaffirm after reaching his majority?

6. I during his minority contracts to sell a horse to D, who contracts to buy it. Is this contract executed or executory? Can I disaffirm the contract during his minority? Suppose that he does not disaffirm it during his minority, is he bound by it upon reaching his majority? If not, what must D show before being able to hold I to the agreement?
7. I during his minority sold and delivered a horse to D and received the purchase price. After reaching his majority he retakes the horse and returns the purchase price to D. What is the effect of this conduct on the contract?
8. I in the foregoing case waited for two years after reaching his majority and then demanded a return of his horse. D refused to return the horse and I brought an action for it. What decision?
9. I, during his minority, sold land to D. Ten years after reaching his majority, I demanded a reconveyance of the land. Is he entitled to it?
10. An infant enters into a contract of partnership with D and others. Is this a contract which must be ratified at majority to render the infant liable on it, or is it a contract which the infant must disaffirm in order to escape future liability?
11. I purchased ten shares of stock in a corporation while an infant. After he reaches his majority, the corporation makes an assessment on stockholders. I refuses to pay his assessment on the ground that he has never ratified the purchase of his stock. Is this a valid defense?

GREEN *v.* GREEN

69 New York Reports 553 (1877)

This was an action of trespass upon lands. The defendant, among other things, pleaded title. The facts found were substantially as follows: On the 8th day of March, 1866, the defendant, being then the owner of the premises in question, and being an infant of the age of about eighteen years, in consideration of the sum of $400 to him paid by the plaintiff, sold and conveyed to the plaintiff, who was his father and knew his infancy and actual age, the said premises, and thereupon entered into possession thereof and has since occupied the same. Prior to the defendant's obtaining his majority, he has wasted or otherwise ceased to possess the purchase price of said premises, and at that time was possessed of no property whatever excepting said land. On or about May 1, 1873, the defendant re-entered upon said premises with the purpose and with notice of his intent to disaffirm the deed, and the alleged trespasses were those done in and about such re-entry.

Judgment for the defendant.

CHURCH, C. J. The important question in this case is whether it was necessary for the defendant to restore the consideration received for the transfer of the land to the plaintiff to entitle him to rescind the contract. The defendant is a son of the plaintiff. He conveyed to the plaintiff the premises in question when under the age of twenty-one years, for which he received the sum of $400. It appeared affirmatively that the son had used up, lost, or squandered the money before he came of age, and had no part of it, nor any other property except the land at the time of arriving at age. After a careful examination of the authorities and the conflicting opinions below, we are inclined to concur with the opinion of Gilbert J., in the affirmance of the judgment. We do not deem it profitable to review authorities upon the question, and do not intend to extend our decision beyond the principal facts involved in this case.

There are expressions of judges, and general rules laid down by text-writers, and some cases which seem to favor the doctrine contended for by the appellant, but in nearly all of them there is a manifest distinction in the facts. The weight of authority is to the contrary effect. 10 Peters U.S. 58; 97 Mass. 508: 6 Gray, 279; 27 Vt. 268; 100 Mass. 174. These and like authorities, we think, accord with the general principles of law for the protection of infants. The right to repudiate is based upon the incapacity of the infant to contract, and that incapacity applies as well to the avails as to the property itself, and when the avails of the property are improvidently spent or lost by speculation or otherwise during minority, the infant should not be held responsible for an inability to restore them. To do so would operate as a serious restriction upon the right of an infant to avoid his contract, and in many cases would destroy the right altogether. A person purchasing real estate of an infant, knowing the fact, and especially the father, must and ought to take the risk of the avoidance of the contract after arriving at maturity. The right to rescind is a legal right established for the protection of the infant, and to make it dependent upon performing an impossibility, which impossibility has resulted from acts which the law presumes him incapable of performing, would tend to impair the right and withdraw the protection. Both upon authority and principle we think a restoration of the consideration could not be exacted as a condition to the rescission on the part of the defendant.

Mere acquiescence for three years after arriving at age without any affirmative act was not a ratification. 11. J. R. 539; 14 Id. 124;

23 Maine R. 517. The entry made by the defendant in this case for the purpose of disaffirming the contract with notice of such intention was sufficient to entitle him to recover. 17 Wend. 120.

The judgment must be affirmed.

QUESTIONS

1. What was the form of action in the principal case? What defense was relied upon by the defendant? What issue was presented by the pleadings? Was it an issue of law or of fact? How was it decided?
2. Was the transaction in the principal case executed or executory? What difference does it make whether it was one or the other?
3. Suppose the infant in the principal case had used or squandered the purchase money after reaching his majority, would that have been evidence of a ratification or evidence of his waiver of the power to disaffirm the contract?
4. The court said: "Mere acquiescence for three years after arriving at age without any affirmative act was not a ratification." Was there any question of ratification in the case? What was really involved? What does the court mean by this statement?
5. A minor sold land to D for $5,000. He still has the money when he reaches his majority. Upon what conditions may he disaffirm the contract of sale and recover his land?
6. In the foregoing case he bought other land with the $5,000. When he reaches his majority he still has the land so purchased. Upon what conditions may he disaffirm the contract with D and recover his land?
7. The minor squandered the $5,000 during his infancy. But when he attaines his majority he has $5,000 which an uncle had given him. Upon what conditions may he disaffirm and recover his land?
8. The minor has nothing when he arrives at his majority. Upon what conditions may he disaffirm the sale and recover his land?
9. A minor purchased land from D and paid $5,000 for it. During his minority he sold the land to B for $2,500 which he immediately squandered. What are his rights against D when he arrives at full age?
10. I, a minor, conveys land to D. Upon reaching his majority, he sells the land to X, who knows of the former transfer. This is an action by X against D for possession of the land. What decision?
11. A minor sells land to X, who sells it to D. D pays value for the land without knowledge that I was a minor when he sold it. What are the rights of I against D?
12. "The disaffirmance must go to the whole of the contract. An infant cannot ratify a part which he deems for his benefit and repudiate the rest." What is meant by this statement?

GREGORY *v.* LEE

64 Connecticut Reports 407 (1894)

TORRANCE, J. The complaint in this case alleges that on the first of June, 1892, the defendant, being a student at Yale College, entered into a contract with the plaintiff by which he leased a room for the ensuing college year of forty weeks, at an agreed rate of $10 per week, payable weekly, and immediately entered into possession of said room, and has neglected and refused to pay the rent of said room for ten weeks ending February 7th, 1893.

It appears that the defendant, a minor, agreed to hire the plaintiff's room for forty weeks at $10 per week, and that he entered into possession and occupied it a part of said period; that he gave up and quit possession of the room and refused to fulfill said agreement on the 20th of December, 1892, paying in full for all the time he had occupied it; that he has never occupied it since, but has been paying for and occupying a suitable room elsewhere.

Under the facts stated, it must be conceded that this room, at the time the defendant hired it and during the time he occupied it, came within the class called "necessaries," and also that to him during said period it was an actual necessary; for lodging comes clearly within the class of necessaries, and the room in question was a suitable and proper one, and during the period he occupied it, was his only lodging room. "Things necessary" are those without which an infant cannot reasonably exist. About these there is no doubt. *Chapple* v. *Cooper*, 13 M. & W. 252; 1 Swift's Digest, 52.

So long, then, as the defendant actually occupied the room as his sole lodging room it was clearly a necessary to him, for the use of which the law would compel him to pay; but as he paid the agreed price for the time he actually occupied it, no question arises upon that part of the transaction between these parties.

The question now is whether he is bound to pay for the room after December 20, 1893. The obligation of an infant to pay for necessaries actually furnished him does not seem to arise out of a contract in the legal sense of that term, but out of the transaction of a quasi-contractual nature; for it may be imposed on an infant too young to understand the nature of a contract at all. *Hyman* v. *Kain*, 3 Jones' L. (N.C.) 111. And where an infant agreed to pay a stipulated price for such necessaries, the party furnishing them recovers not necessarily that price, but only the fair and reasonable value of

the necessaries. *Earl* v. *Reed*, 10 Metc. 387; *Barnes* v. *Barnes*, 50 Conn. 572; *Trainer* v. *Trumbull*, 141 Mass. 527; Keener's Quasi-Contracts, p. 20. This being so, no binding obligation to pay for necessaries can arise until they have been supplied to the infant; and he cannot make a binding executory agreement to purchase necessaries. For the purpose of the case, perhaps we may regard the transaction which took place between these parties in September, 1891, either as an agreement on the part of the defendant, as an executory agreement, to supply the defendant with necessary lodging for the college year, and on the part of the defendant as an executory agreement to pay an agreed price for the same from week to week; or we may regard it as what, on the whole, it appears the parties intended it to be, a parol lease under which possession was taken, and an executory agreement on the part of the defendant to pay rent. If we regard it in the former light, then the defence of infancy is a good defence; for in that case the suit is upon an executory contract to pay for necessaries which the defendant refused to take, and never has had, and which, therefore, he may void. If we regard the transaction as a lease under which possession was taken, executed on the part of the plaintiff, with a promise or agreement on the part of the defendant to pay rent weekly, we think infancy is equally a defence.

As a general rule, with but few exceptions, an infant may avoid his contracts of every kind, whether beneficial to him or not, and whether executed or executory. *Riley* v. *Mallory*, 33 Conn. 201. The alleged agreement in this case does not come within any of the recognized exceptions of this general rule. "An infant lessee may also avoid a lease, although it is always available for the purpose of vesting the estate in him so long as he thinks proper to hold it. As to his liability for rent, or the performance of the stipulations contained in the lease, he is in the same situation, with respect thereto, as in case of any other contract; for he may disaffirm it when he comes of age, or at any time previous thereto, and thus avoid his obligation." Taylor's Landlord and Tenant, sec. 96. In this case the defendant gave up the room and repudiated the agreement, so far as it was in his power to do so, in the most positive and unequivocal manner.

The plea of infancy, then, under the circumstances, must prevail, unless the matters set up in reply make the facts set up in the answer unavailable in this case. Upon this point, without dwelling in detail upon the matters set up in the different paragraphs of the reply, we

deem it sufficient to say that neither singly nor combined do the matters set up constitute a sufficient reply to the answer.

There is no error.

QUESTIONS

1. What was the action brought for in this case? Did the plaintiff recover what he asked for? Why or why not?
2. What is meant by the expression at the close of the opinion, "There is no error"?
3. A minor promises to pay for the following which have been furnished him at his request: (*a*) repairs to his house, (*b*) insurance on his house, (*c*) insurance on his life, (*d*) legal services to protect his property, (*e*) tuition at a high school, (*f*) clothes, (*g*) food, and (*h*) jewelry. For which of these may he be held liable?
4. P a tailor makes and delivers a suit of clothes to a minor, for which the latter agrees to pay $75. P brings an action for the price of the suit. What decision?
5. P makes a suit at the request of minor, for which the minor promises to pay $75. The minor refuses to accept the suit when it is finished. P sues for the reasonable value of the suit. What decision?
6. In the foregoing case, the minor takes the suit, wears it three weeks and returns it to the tailor. The tailor sues for the reasonable value of the suit. What decision?
7. P advances money to a minor with which to purchase necessaries. (*a*) The minor squanders the money. (*b*) The minor buys the necessaries from X. What are P's rights against the minor in each case?
8. P furnished clothing to a minor, ignorant of the fact that the uncle of the minor was then furnishing him with all the clothing he needed. What are the rights of P against the minor?
9. What is the test as to whether a given article comes under the category of necessaries?
10. Upon what theory is an infant held for the value of necessaries furnished to him?

FITTS *v.* HALL

9 New Hampshire Reports 441 (1838)

Case. The declaration alleged, that on the 26th day of May, 1830, the plaintiff owned and was possessed of a large quantity of palm leaf and chip hats, that a conversation was then had between the parties about the defendant's purchasing the hats of the plaintiff, that the plaintiff, not knowing whether the defendant was of age, inquired of him whether he was of full age or not; and that the defendant, well knowing that he was an infant under the age of

twenty-one, and intending to deceive and defraud the plaintiff, falsely and deceitfully represented that he was then of full age; and that thereupon the plaintiff, confiding in that representation, sold and delivered the hats to the defendant on a credit of six months, and took his note therefor, on that time, for the sum of $57. The declaration further sets forth, that the note not being paid when due, the plaintiff sued the defendant thereon, and duly entered and prosecuted his action, that the defendant pleaded first the general issue, and secondly, infancy, that the plaintiff joined the general issue, and to the plea of infancy replied that the defendant, at the time of giving the note, represented himself to be of full age, etc., that to this replication there was a demurrer and joinder; and it was considered by the court that the replication was bad and insufficient; and thereupon the plaintiff became nonsuit, and the defendant, recovered judgment for his costs, taxed at $37.50; and that the defendant, by his said false and deceitful affirmation, obtained possession of said hats, and deceived and defrauded the plaintiff, and has never paid said note, nor redelivered the hats to the plaintiff, nor paid him therefor.

There was also a count in trover for the hats. The plaintiff on the trial introduced evidence in support of the allegations in the first count.

The court instructed the jury, that if they were satisfied, from the plaintiff's evidence, of the truth of the facts set forth in the declaration, they might, for the purpose of this trial, consider the action sustainable in point of law; and that, if they found a verdict for the plaintiff they might find such an amount as would indemnify the plaintiff for the loss he had sustained in consequence of the defendant's false and fraudulent representations.

The jury found a verdict for the plaintiff for $128.91; whereupon the defendant moved that the verdict be set aside, and a nonsuit entered.

PARKER, C. J. The general principle applicable to this case is, that an infant is liable in actions *ex delicto*, whether founded on positive wrongs, or constructive torts, or frauds. 2 Kent's Com. 97; 1 Chitty's Pl. 65.

Thus he is liable in trover, although the goods converted were in his possession by virtue of a previous contract. 6 Cranch's Rep. 231; *Vasse* v. *Smith;* 3 Pick. 492, *Homer* v. *Thwing*. And in detinue, where he received skins to finish, and afterwards withheld them.

4 Bos. & Pul. 140, *Mills* v. *Graham*. And assumpsit for money had and received, has been sustained against an infant for money embezzled. 1 Esp. Rep. 172, *Bristow* v. *Eastman;* Peake's Rep. 222, S.C.

But a matter of contract, or arising *ex contractu* and properly belonging to that class, is not to be turned into a tort, in order to charge the infant by a change of the form of action. 2 Kent's Com. 197. As, for instance, where the plaintiff declared that having agreed to exchange mares with the defendant, the defendant, by falsely warranting his mare to be sound, well knowing her to be unsound, falsely and fraudulently deceived the plaintiff, etc.: held that infancy was a good plea in par. 2 Marshall's Rep. 485, *Green* v. *Greenbank;* 4 E. C. L. Rep. 375.

In *Jennings* v. *Randall* the plaintiff declared in the case, that, at the request of the defendant, he delivered to him a certain mare to be moderately ridden, and the defendant wrongfully rode her in an immoderate, excessive and improper manner, and took so little care of her, that by reason thereof she was strained and damaged; and in a second count alleged that he delivered the mare to the defendant to go and perform a reasonable and moderate journey, and the defendant wrongfully rode and worked her a much longer journey. On a demurrer to a plea of infancy, the court considered the action as founded substantially on the contract, and gave judgment for the defendant. Lord Kenyon said, "the plaintiff let the mare to hire; and in the course of the journey an accident happened, the mare being strained, and the question is, whether this action can be maintained. I am clearly of the opinion that it cannot; it is founded on contract. If it were in the power of a plaintiff to convert that which arises out of a contract into a tort, there would be an end of that protection which the law affords to infants." 8 D. & E. 336.

In *Campbell* v. *Stokes*, 2 Wendell 137, where an infant took a mare, on hire, and drove her with such violence, and otherwise cruelly used her, that she died, it was held that trespass might be maintained against him, and the judgment of the supreme court was unanimously confirmed by the court of errors. Chancellor Walworth said, "If the infant does any willful and positive act, which amounts on his part to an election to disaffirm the contract, the owner is entitled to the immediate possession. If he willfully and intentionally injures the animal, an action of trespass against him for the tort. If he should sell the horse an action of trover would lie, and his infancy would not protect him."

The principle to be deduced from these authorities seemed to be, that if the tort or fraud of an infant arises from a breach of contract, although there may have been false representations or concealment respecting the subject matter of it, the infant cannot be charged for this breach of his promise or contract, by a change in the form of action. But if the tort is subsequent to the contract, and not a mere breach of it, but a distinct, wilful and positive wrong of itself, then, although it may be connected with a contract, the infant is liable.

Upon this principle the count in trover, in this case, cannot be supported, upon the evidence offered. The goods went into the possession of the defendant by virtue of a contract, which he has avoided by reason of his infancy. The effect of that contract was to authorize him to appropriate the goods to his own use as owner, and to dispose of them at his pleasure. If he has done so by using them, or selling them to third persons, so that he cannot redeliver them, neither his refusal to pay, nor his refusal to deliver the goods, can be considered as anything more than a breach of contract. A refusal to pay is a breach of the express contract and a refusal to return the goods, after he had converted them with the assent of the plaintiff, and when he no longer had it in his power to return them, could be considered as no more than a breach of an implied assumpsit to return the goods, upon request, after he had rescinded the contract by a refusal to pay. Were this otherwise, the law would furnish him no protection against his contract, in such case; for by a subsequent demand of the goods, which he had not the power to comply with, he would be liable for their value in trover, although he could not be charged in assumpsit. It does not appear in this case that there was such a demand; but if one was made there is no evidence that the defendant, after he has denied his liability on the contract, could have complied with it.

The next question is, whether this action can be maintained against the defendant, for the fraudulent representation that he was of age, by reason of which the plaintiff was induced to sell him the hats on credit, and to take his note.

An action may be maintained for false and fraudulent representations, in order to induce a party to sell, and whereby he was induced to sell, goods to one of the defendants, on a credit. 3 Pick. R 33.36, *Livermore* v. *Herschell.*

But *Johnson* v. *Pie*, 1 Lev. 169, was "case, for that the defendant, being an infant, affirmed himself to be of full age, and by means thereof

the plaintiff lent him 100 pounds, and so he has cheated the plaintiff by this false affirmation." After verdict for the plaintiff, it was moved in arrest of judgment that the action would not lie for this false affirmation, but the plaintiff ought to have informed himself by others. "Kelynge and Wyndham held, that the action did not lie, because the affirmation, being by an infant, was void; and it is not like to trespass felony, &c., for there is a fact done. Twysden doubted, for that infants are chargeable for trespasses. Dyer 105; and so, if he cheat with false dice, &c." The report in Levinz states that the case was adjourned; but in a note, referring to 1 Keb. 905, 913, it is stated that judgment was arrested.

If this case be sound, the present action cannot be sustained on the first count. From a reference in the margin, it seems that the same case is reported, 1 Sid. 258. Chief Baron Comyns, however, who is himself regarded as high authority, seems to have taken no notice of this case in his Digest, "Action on the case for Deceit," but lays down the rule that "If a man affirms himself of full age when he is an infant, and thereby procures money to be lent to him upon mortgage," he is liable for the deceit; for which he cites, 1 Sid. 183. Com. Div., Action &c. A. 10.

We are of opinion that this is the true principle. If infancy is not permitted to protect fraudulent acts, and infants are liable in actions *ex delicto*, whether founded on positive wrongs, or constructive torts, or frauds (2 Kent 197), as for slander (Noys Rep. 129, *Hodsman* v. *Grissel*), and goods converted (auth ante), there is no sound reason that occurs to us why an infant should not be chargeable in damages, for a fraudulent misrepresentation, whereby another has received damage.

In the argument of *Johnson* v. *Pie*, Grove and Nevill's case was cited, "where, in case against an infant, for selling a false jewel, affirming it to be a true one, it was judged the action did not lie," and the case seems to have been considered as if the affirmation that he was of age was to be regarded as part of the contract. But there is a wide difference between the two cases. In Grove and Nevill's case the subject matter of the contract was the jewel which was sold.

If the defendant had been of age, assumpsit might have been maintained. The infant was not to be charged, by adopting a different form of action. But the representation in *Johnson* v. *Pie*, and in the present case, that the defendant was of full age, was not part of the contract, nor did it grow out of the contract, or in any way result from

it. It is not any part of its terms, nor was it the consideration upon which the contract was founded. No contract was made about the defendant's age. The sale of the goods was not a consideration for this affirmation or representation. The representation was not a foundation for an action of assumpsit. The matter arises purely *ex delicto*. The fraud was intended to induce and did induce the plaintiff to make a contract for the sale of the hats, but that by no means makes it part and parcel of the contract. It was antecedent to the contract; and if an infant is liable for a positive wrong connected with a contract, but arising after the contract has been made, he may well be answerable for one committed before the contract was entered into although it may have led to the contract.

It has been said that "all the infants in England might be ruined if infants were bound by all acts that sound in deceit." But this can not be a reason why the action should not be maintained for the fraudulent wrongs done, for the same reason would seem to apply equally well in cases of slander, trover and trespass. The latter are as much the results of the indiscretion as the former, and quite as likely to be committed.

Our conclusion is that the action may be sustained on the first count.

But we are of opinion that the plaintiff is not entitled to recover, in damages, the costs of the action he commenced on the note, or those which he was obliged to pay in that suit. For aught which appears, he knew, when he commenced that action, that the defendant was an infant, and would avail himself of his infancy. If he chose to try an experiment, he must abide by the consequences. For this reason the verdict must be set aside, and a New Trial Granted.

QUESTIONS

1. What was the form of action in this case?
2. What is meant by the statement, "There was also a count in trover"?
3. What is meant by actions *ex delicto*?
4. D negligently injured P. P sues for damages. D pleads that he is an infant. What decision?
5. D commits a trespass on the land of P. P sues for damages. D pleads that he is an infant. What decision?
6. Why should an infant be held liable for damages arising out of the commission of a tort and not for damages arising out of the breach of a contract?

7. If the action in the principal case had been brought on the note, would the infant have been estopped to deny his age?
8. Suppose that the minor, falsely and fraudulently misrepresenting his age, had purchased and paid for the hats, could he thereafter have avoided the contract?
9. A minor hired a horse for riding. He used the horse for hauling, as a result of which the horse was injured. What are P's rights against the minor?
10. What was the decision of the court on the count in trover?
11. A minor in selling a horse to P falsely and fraudulently misrepresented the age of the horse. P sues him in deceit. What decision?
12. What is the test for determining whether false and fraudulent statements made by an infant in connection with the formation of a contract are actionable or not? What test did the principal case lay down for determining this question?

SEAVER *v.* PHELPS

11 Pickering's Massachusetts Reports 304 (1831)

Trover, to recover the value of a promissory note, pledged by the plaintiff to the defendant. The suit was brought on the ground that the plaintiff was in a state of insanity at the time when he made the pledge. At the trial in the Common Pleas, before William J., the counsel for the defendant requested the judge to instruct the jury, that although they should believe the plaintiff was insane and incapable of understanding at the time of making the contract, yet that if the defendant was not appraised of the fact, or had no reason, from the conduct of the plaintiff or from any other source, to suspect it, and did not overreach or impose upon the plaintiff or practice any fraud or unfairness, then the contract was not to be annulled. But the judge held this not to be law, and instructed the jury otherwise; and the jury returned a verdict for the plaintiff.

To this opinion the defendant excepted.

WILD, J. The general doctrine that the contracts, and other acts *in pais*, of idiots and insane persons, are not binding in law or equity, is not denied. Being bereft of reason and understanding, they are considered incapable of consenting to a contract, or of doing any other valid act. And although their contracts are not generally absolutely void, but only voidable, the law takes care effectually and fully to protect their interests; and will allow them to plead their disability in avoidance of their conveyances, purchases and contracts, as was settled in *Mitchell et al* v. *Kingman*, 5 Pick. 431. And such is

probably the law in England at the present day, although the doctrine for a long time prevailed there, that no one should be allowed to plead his own incapacity and to stultify himself. These principles are not controverted by the defendant's counsel; but they maintain, that if the plaintiff was of unsound mind and incapable of understanding, at the time he pledged the note to the defendant, yet if the defendant was not apprised of that fact, or had no reason to suspect it from the plaintiff's conduct, or from any other sources, and did not overreach him, or practice any fraud or unfairness, then that the contract of bailment was valid and binding, and could not be avoided in the present action. And they requested the court of Common Pleas so to instruct the jury. That court, however, was of the opinion that the law was otherwise, and we concur in the same opinion. If it had only been proved that the plaintiff was a person of weak understanding, the instructions requested would have been appropriate and proper. For every man after arriving at full age, whether wise or unwise, if he be *compos mentis*, has the capacity and power of contracting and disposing of his property, and his contracts and conveyances will be valid and binding, provided no undue advantage be taken of his imbecility.

It is sometimes difficult to determine what constitutes insanity, and to distinguish between that and great weakness of understanding. The boundary between them may be very narrow, and, in fact, often is, although the legal consequences and provision attached to the one and the other, respectively, are widely different.

In the present case, however, this point is settled by the verdict, and no question is made respecting it. We are to consider the plaintiff as in a state of insanity at the time he pledged his note to the defendant; and this being admitted, we think it cannot avail him as a legal defence, to show that he was ignorant of the fact, and practiced no imposition. The fairness of the defendant's conduct cannot supply the plaintiff's want of capacity.

The defendant's counsel rely principally on a distinction between contracts executed, and those which are executory. But if this distinction were material, we do not perceive how it is made to appear that the contract of bailment is an executed contract, for if the note was pledged to secure the performance of an executory contract, and was part of the same transaction, it would rather be considered an executory contract. But we do not consider the distinction at all material. It is well settled that the conveyance of a *non compos* are

voidable, and may be avoided by the writ *dum fuit non compos mentis*, or by entry.

The case of *Bagster et al.* v. *The Earl of Portsmouth*, 5 Barn. & Cressw. 172, but more fully reported in 7 Dowl & Ryl. 614, has been relied on as countenancing the distinction contended for, and to show its bearing on the point in question; and it is true that some of the remarks which fell from the court in giving their opinion, may be thought to have some bearing in this respect. But the point decided, and the grounds of the decision, not only fail to support the defence in this action, but may be considered as an authority in favor of the plaintiff. That was an action of assumpsit for the use of certain carriages hired by the defendant, he being at the time of unsound mind, and judgment was rendered for the plaintiff on the ground that no imposition had been practiced on his part; and particularly because the carriages furnished appeared to be suitable to the condition and degree of the defendant, considering the contracts of a *non compos* on the same footing as those of an infant; and the court say, in *Thompson v. Lech.* 3 Mod. 310, "that the grants of infants, and of persons *non compos* are parallel both in law and reason." Now, no one would, we apprehend, undertake to maintain that the plaintiff would have been bound if he had been a minor when he pledged the note. It does not appear to have been pledged for necessaries; and all contracts of infants are either void or voidable, unless made for education or necessaries suitable to their degree and condition. And even if the note had been pledged as security for the payment of necessaries, it would not have been binding if the plaintiff had been an infant. For a pledge is in the nature of a penalty, and may be forfeited, and can be of no advantage to the infant, and therefore shall not bind him.

If then, idiots and insane persons are liable on their contracts for necessaries, they are certainly entitled to as much protection as infants. It matters not, however, how this may be, since the contract in question is not one for necessaries.

In the case of *Brown* v. *Foddrell*, 1 Moody & Malkin, 105, Lord Tenterden expresses an opinion, that in assumpsit for goods sold and delivered, and for work and labor, it would be no defence that the defendant was of unsound mind, unless the plaintiff knew of it, or in any way took advantage of his incapacity, to impose on him. This, however, was an opinion expressed at *nisi prius* and whether the opinion was followed up to the final decision of the case or not, does

not appear. But however this may be, the opinion is founded on the old rule, somewhat qualified, that no one can be allowed to plead his own disability or incapacity, in avoidance of his contracts. This rule having been wholly exploded in this commonwealth. Lord Tenterden's opinion can have no weight here, unless some good reason could be shown for overruling the case of *Mitchell et al.* v. *Kingham*, which we think cannot be done.

We are aware that insanity is sometimes hard to detect, and that persons dealing with the insane may be subjected to loss and difficulty; but so they may be by dealing with minors. The danger, however, cannot be great, and seems to furnish no sufficient cause for modifying the rules of law in relation to insane people, if we had any power and authority to do so, which we have not.

Judgment affirmed.

QUESTIONS

1. What was the form of action in the principal case? What instruction did the plaintiff ask that the court give to the jury? What instruction was given?
2. While insane, D enters into a contract by which he agrees to buy P's horse. What is the liability of D on this contract in case he becomes sane again?
3. While insane P sells his horse to D. What are the rights of P in case he becomes sane again?
4. What is the test of insanity in determining whether a person is bound by his contracts?
5. Is an insane person liable for necessaries furnished him? For necessaries furnished his wife and children?
6. D, while drunk, makes a contract with P. P brings this action on the contract. What decision?

HARLEY *v.* THE STATE

40 Alabama Reports 689 (1867)

JUDGE, J. Under the demurrer interposed in the court below, the following allegations of one of the pleas are to be taken as true: 1st, that Harley purchased the lands described in the information on the 2nd day of April, 1857, and that there was a conveyance to him of the title on that day; 2nd, that, at the time of the said conveyance, Harley was an unnaturalized alien, but previously thereto he had filed his declaration of intention to become a citizen of the United States, and was duly admitted to such citizenship on the 1st

of November, 1860, by the judgment of the Circuit Court of Cook County, in the state of Illinois. These allegations present the merits of the main question involved, which we proceed to consider.

An alien may acquire land by purchase, but not by descent; and there is no distinction, whether the purchase be by grant, or by devise; in either event, the estate vests in the alien a defeasible estate, subject to escheat at the suit of the government. He has complete dominion over the estate of which he is thus seized, until office found; may hold it against every one, even against the government and may convey it to a purchaser—that is to say, may convey a defeasible estate only, subject to be divested on office found. The ancient rule of the common law was, that an alien could not maintain a real action for the recovery of lands, but he might, in such action defend his title against all persons, but the sovereign. It has been held, however, in North Carolina, if not in other states of the Union, that he may maintain ejectment. The common law was, also, that the king could not grant lands forfeited by alienage, until he was in possession by office found; but when the alien died, the sovereign was seized without office found, because, otherwise, the freehold would be in abeyance, as the alien could have no inheritable blood.

As to grants for the cause of alienage, by state legislation, without an inquest of office, Judge Story has said: "That an inquest of office should be made in cases of alienage is a useful and important restraint upon public proceedings. It protects individuals from being harassed by numerous suits, introduced by litigious grantees. It enables the owner to contest the question of alienage directly, by a traverse of the office. It affords an opportunity for the public to know the nature, the value, and the extent, of its acquisitions *pro defectu haeredis*. And above all, it operates as a salutary suppression of that corrupt influence which the avarice of speculation might otherwise urge on the legislature. The common law, therefore, ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose." *Fairfax's Divisee* v. *Hunter's Lessee*, 7 Cranch 603. But each state has undoubted right to enact laws regulating the descent of, and succession to, property within its limits, and consequently to permit inheritance by or from an alien.

When Harley purchased the land in controversy, and during the period of his alienage thereafter, he was seized of a defeasible estate in the premises, accompanied with all the incidents of ownership of such an estate. During the same period, the only right which the

state could have in the premises was the right to have the land escheated, by a judicial proceeding in the nature of an inquest of office. This prerogative right of sovereignty was not asserted during the period of Harley's alienage; but he was permitted to retain his estate, without molestation, until he had been admitted to full citizenship. This result effected an extinguishment of the right of the state to escheat the land if such right existed, and perfected the title of Harley. As Sir Matthew Hale has said: "The law is very gentle in the constructions of the disability of alienism, and rather contracts than extends its severity." 2 Kent 56–62. See also *Jackson* v. *Beach*, 1 Johnson's Cases 399; *White* v. *White*, 2 Met. (Ky.) 189.

Foreigners are admitted to the rights of citizenship with us, on liberal terms; and the public policy of the United States in regard to their becoming citizens, as shown by the naturalization laws of the government, is certainly in harmony with the main conclusion attained in the present case. 2 Kent's Com. 56.

Judgment reversed and cause remanded.

QUESTIONS

1. Who is an alien? May he acquire, hold, and dispose of property? May he make contracts? May he sue and be sued in the courts?
2. Can an alien take property by descent? What becomes of the property of an alien who dies without disposing of it?
3. An alien sells Blackacre to C, a citizen. What kind of title does C get?
4. Who is an alien enemy? A, an alien enemy, is suing upon a contract made while he was merely an alien. May he recover?
5. A, an alien enemy, enters into a contract with B, which is otherwise valid. May A enforce it against B? May B enforce it against A? May A or B enforce it after A ceases to be an alien enemy?
6. Why does the law adopt the policy it does with reference to aliens?

CHAPTER III

TORTS

1. Introductory Topics

A

Carver in a classic statement has pointed out that scarcity of economic goods is the explanation of most, if not all, of our social and economic problems. This fact of scarcity, as he shows, has resulted in various conflicts and struggles between members of society, each one competing with the other for the possession of those things which satisfy human wants. In response to the demand for the production of as many economic goods as possible, our modern industrial society has evolved.

This industrial society has certain outstanding characteristics which are significant in this connection. It is a co-operative exchange society. Each one produces a given thing and there results an exchange so that all, in theory if not in fact, share in the enjoyment of the common products. It is an individual exchange society. Production is not controlled by the state but is left to the guidance of the individual. In various ways society has induced the individual to maintain and operate the complicated machinery of this industrial society by which human wants are satisfied.

In the present organization of society, therefore, the individual is the one important agent of production. Society has placed heavy responsibilities on his shoulders. It has commanded that he throw himself into the scheme of things and assist in accomplishing its ends. This is but another way of saying that society has laid great emphasis on individual activities, for only through such activities can the desired results be attained.

But it does not follow from what has been said that complete free play is accorded the individual. There is an equilibrium which society seeks constantly to maintain. On the one hand, it seeks to extend the range of individual activites as far as possible to the end that production may be increased. On the other hand, it is forced to restrict individual activites to certain very definite areas for the common welfare.

This equilibrium is maintained by various agents and in various ways. Law, obviously enough, is one of the most significant instrumentalities in effecting this balance of conflicting interests. The so-called Law of Torts is but a part of this larger instrument of control. The law, in general, says that each individual member of society may act freely, but that under certain circumstances he must answer in damages to those who may have been injured by his activities. Wisely enough, the law also says that only the aggrieved person shall be entitled to set in motion the legal machinery for the collection of damages for such injuries.

The purpose of this study of torts is to examine some of the fundamental conditions under which private persons may secure redress for private injuries. In this study, the following general problems must be considered: (1) What are the interests which the law deems worthy of protection? (2) To what extent does the law afford protection to these interests against invasion? (3) In what way or ways does the law fix responsibility for the invasion of these protected interests?

B

Legal scholars have found it difficult, if not impossible, to define the tort relation or tort liability in a positive, descriptive way, with any degree of conciseness. It is comparatively simple to say what a tort is not, but difficult to say affirmatively what it is. It has, indeed, been said that there is no law of torts, but, instead, a law of each separate tort. This is explained by the historical growth of those principles of liability ordinarily grouped together as the Law of Torts.

> The ancient common law knew nothing of large classifications founded on the substantive nature of what was in issue. There were forms of action with their appropriate writs and process, and authorities and traditions whence, or in theory was capable of being known, whether any given set of facts would fit into any and which of these forms. In early times it was the existence of a remedy in the King's Court, not the failure to provide a remedy for an apparent wrong, that was exceptional. No doubt the forms of actions fell, in a manner, into natural classes or groups. But no attempt was made to discover or apply any general principles of arrangement.[1]

The following represent in a very general way the various types of tort liability: (*a*) liability arising from wrongful acts, independent of breaches of contracts, for which the proper remedy is an action for damages; (*b*) liability arising from acts, independent of breaches of

[1] Pollock, *Law of Torts* (8th ed.), pp. 3-4.

contracts, where the absence of culpability is difficult to prove, for which the proper remedy is an action for damages; (*c*) certain miscellaneous types of liability, independent of breaches of contract, where no culpability exists, for which the proper remedy is an action for damages.

A tort must be distinguished from a crime. Both are wrongs. But a crime is a wrong so serious in its consequences, that the state itself intervenes and punishes the wrong-doer. A crime in most respects is the same as a tort in the first sense above mentioned, except that the proceedings are brought by the state and not by the injured individual and that the legal consequence is punishment and not compensation. The same act may be the basis of both a tort and of a crime. In this event the injured person may recover such damages as he has suffered and the state may punish the offender in some appropriate manner.

Tort liability must also be distinguished from the liability which springs from the breach of a contract. Both are wrongs in the sense that damages may be recovered by the injured person in either case. Both are liabilities created by law in the sense that the law says on the one hand that a person shall cause another temporal damages without justification, and on the other hand that a person must not break his contracts. But the obligation to keep one's contracts is based fundamentally upon his assent, whereas the obligation or duty not to injure another is imposed by law upon every person by law regardless of that person's consent.

The same act may be a tort, a breach of contract and a crime. Suppose that a physician contracts to care for A while ill. The physician intentionally administers poison to A. At his election A may sue the physician in tort or for a breach of a contract. At the same time the state may punish the doctor for the intentional administration of poison, which is an attempt to commit murder.

A final distinction should be made between tort liability and quasi-contractual liability. Both are results of wrongs. Both arise independently of the assent of the parties. But the quasi-contractual liability is created to prevent one person from being unjustly enriched at the expense of another: it is based upon the theory of restitution of something which rightfully belongs to the wrong individual; whereas the tort liability is based upon the theory of compensation: one person has injured another and should compensate the latter for the injury.

2. Invasions of Protected Interests

a) Bodily Security

BEACH *v.* HANCOCK

27 New Hampshire Reports 223 (1853)

Trespass, for an assault.

Upon the general issue it appeared that the plaintiff and defendant, being engaged in an angry altercation, the defendant stepped into his office, which was at hand, and brought out a gun, which he aimed at the plaintiff being three or four rods distant. The evidence tended to show that the defendant snapped the gun twice at the plaintiff, and that the plaintiff did not know whether the gun was loaded or not, and that, in fact the gun was not loaded.

The court ruled that the pointing of a gun, in an angry and threatening manner, at a person three or four rods distant, who was ignorant whether the gun was loaded or not, was an assault, though it should appear that the gun was not loaded, and that it made no difference whether the gun was snapped or not.

The defendant excepted to these rulings and instructions. The jury, having found a verdict for the plaintiff, the defendant moved for a new trial by reason of said exceptions.

GILCHRIST, C. J. One of the most important objects to be attained by the enactment of laws and the institutions of civilized society is, that each of us shall feel secure against unlawful assaults. Without such security society loses most of its value. Peace and order and domestic happiness, inexpressibly more precious than mere forms of government, cannot be enjoyed without the sense of perfect security. We have a right to live in society without being put in fear of personal harm. But it must be a reasonable fear of which we complain. And it surely is not unreasonable for a person to entertain a fear of personal injury, when a pistol is pointed at him in a threatening manner, when, for aught he knows, it may be loaded, and may occasion his immediate death. The business of the world could not be carried on with comfort, if such things could be done with impunity.

We think the defendant guilty of an assault, and we perceive no reason for taking any exception to the remarks of the court. Finding trivial damages for breaches of the peace, damages incommensurate with the injury sustained, would certainly lead the ill-disposed to consider an assault as a thing that might be committed with impunity.

But at all events it was proper for the jury to consider whether such a result would or would not be produced.

Judgment on the verdict.

QUESTIONS

1. What is meant by the expression "Trespass for an assault"?
2. What instruction did the trial court give to the jury? Was the instruction correctly given?
3. D, in striking distance, with a club in his hand, says to P, "If you open your mouth, I will knock you down." P sues D for damages. What decision?
4. D, in striking distance, shakes a whip threateningly at P, saying, "I am of a great mind to kill you." P sues D for damages. What decision?
5. D says to P, "If we were not here in a public place, I would knock you down." P sues D for damages. What decision?
6. D, over a telephone, uses abusive language to P, saying, among other things, "When I see you again, I am going to black your eyes." P sues D for damages. What decision?
7. D makes a threat of violence to P who being temperamentally nervous is unreasonably alarmed. P sues D for damages. What decision?
8. P is entitled to go into a certain building. D, without offering or threatening any violence, stands at the door and prevents P from entering. P sues D for damages. What decision?
9. D gives P poisoned candy, intending that P shall eat it and suffer therefrom. (*a*) P does not eat the candy. Is D's conduct actionable? (*b*) P eats the candy and suffers physical damages therefrom. P sues D for damages. What decision?
10. D strikes the horse on which P is riding. P sues D in an action of trespass for an assault. What decision?
11. P, desiring to be a better beggar, persuades D to cut off his, P's, right hand. P later sues D for damages. What decision?
12. D throws hot water on P. What are P's rights against D?
13. D spits on P. What are P's rights against D?
14. What is an assault? What is a battery?
15. What interest or interests does the law seek to protect by giving damages to one who has been assulted?

SPADE *v.* LYNN AND BOSTON RY. CO.

168 Massachusetts Reports 285 (1897)

Tort, for personal injuries occasioned to the plaintiff by the alleged negligence of the defendant.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions, the nature of which appears in the opinion.

ALLEN, J. This case presents a question which has not heretofore been determined in this Commonwealth, and in respect to which the decisions elsewhere have not been uniform. It is this: whether in an action to recover damages for an injury sustained through the negligence of another, there can be a recovery for a bodily injury caused by mere fright and mental disturbance. The jury was instructed that a person cannot recover for mere fright, fear, or mental distress occasioned by the negligence of another which does not result in bodily injury; but that when the fright or fear or nervous shock produces a bodily injury, there may be a recovery for that bodily injury, and for all the pain, mental or otherwise, which may arise out of that bodily injury.

The case calls for a consideration of the real ground upon which the liability or non-liability of a defendant guilty of negligence in a case like the present depends. The exemption from liability for mere fright, terror, alarm, or anxiety does not rest on the assumption that these do not constitute an actual injury. They do in fact deprive one of enjoyment and comfort, cause real suffering, and to a greater or less extent disqualify one for the time being from doing the duties of life. If these results flow from a wrongful or negligent act, a recovery therefore cannot be denied on the ground that the injury is fanciful and not real. Nor can it be maintained that these results may not be the direct and immediate consequence of the negligence. Danger excites alarm. Few people are wholly insensible to the emotions caused by imminent danger though some are less affected than others.

It must also be admitted that a timid or sensitive person may suffer not only in mind, but also in body, from such a cause. Great emotion may and sometimes does produce physical effects. The action of the heart, the circulation of the blood, the temperature of the body, as well as the nerves and the appetite, may all be affected. A physical injury may be directly traceable to fright, and so may be caused by it. We cannot say, therefore, that such consequences may not flow proximately from unintentional negligence, and if compensation in damages may be recovered for a physical injury so caused, it is hard on principle to say why there should not also be a recovery for the mere mental suffering when not accompanied by any perceptible physical effects.

It would seem therefore that the real reason for refusing damages sustained from mere fright must be something different; and it prob-

ably rests on the ground that in practice it is impossible satisfactorily to administer any other rule. The law must be administered in the courts according to general rules. Courts will aim to make these rules as just as possible, bearing in mind that they are to be of general application. But as the law is a practical science, having to do with the affairs of life, any rule is unwise if in its general application it will not as a usual result serve the purpose of justice. A new rule cannot be made for each case, and there must therefore be a certain generality in rules of law, which in particular cases may fail to meet what would be desirable if the single case were alone to be considered.

Rules of law respecting the recovery of damages are framed with reference to the just rights of both parties; not merely what it might be right for an injured person to receive, to afford just compensation for his injury, but also what it is just to compel the other party to pay. One cannot always look to others to make compensation for injuries received. Many accidents occur, the consequences of which the sufferer must bear alone. And in determining the rules of law by which the right to recover compensation for unintended injury from others is to be governed, regard must chiefly be paid to such conditions as are usually found to exist. Not only the transportation of passengers and the running of trains, but the general conduct of business and of the ordinary affairs of life, must be done on the assumption that persons who are liable to be affected thereby are not peculiarly sensitive, and are of ordinary physical and mental strength. If, for example, a traveler is sick or infirm, delicate in health, especially nervous or emotional, liable to be upset by slight causes and therefore requiring precautions which are not usual or practicable for travelers in general, notice should be given, so that reasonably practicable arrangements may be made accordingly, and extra care be observed. But as a general rule a carrier of passengers is not bound to anticipate or to guard against an injurious result which would only happen to a person of peculiar sensitiveness. This limitation of liability for injury of another description is intimated in *Allsop* v. *Allsop*, 5 H. & N. 534, 538, 539. One may be held bound to anticipate and guard against the probable consequences to ordinary people, but to carry the rules of damages further imposes an undue measure of responsibility upon those who are guilty only of unintentional negligence. The general rule limiting damages in such a case to the natural and probable consequences of the acts done is of wide application, and has often been expressed and applied.

The law of negligence in its special application to cases of accidents has received great development in recent years. The number of actions brought is very great. This should lead courts well to consider the grounds on which claims for compensation properly rest, and the necessary limitations of the right to recover. We remain satisfied with the rule that there can be no recovery for fright, terror, alarm, anxiety or distress of mind if these are unaccompanied by some physical injury; and if this rule is to stand we think it should also be held that there can be no recovery for such physical injuries as may be caused solely by such mental disturbances, where there is no injury to the person from without. The logical vindication of this rule, is, that it is unreasonable to hold persons who are merely negligent bound to anticipate and guard against fright and the consequences of fright; and that this would open a wide door for unjust claims, which could not be successfully met.

It is hardly necessary to add that this decision does not reach those classes of actions where an intention to cause mental distress or to hurt the feelings is shown, or is reasonably to be inferred, as for example, in cases of seduction, slander, malicious prosecution, or arrest, and some others. Nor do we include cases of acts done with gross carelessness or recklessness, showing utter indifference to such consequences, when they must have been in the actor's mind. *Lombard* v. *Lenno* and *Fillebrown* v. *Hoar*, already cited, *Meagher* v. *Driscoll*, 99 Mass. 281.

Exceptions sustained.

QUESTIONS

1. What was the issue involved in the principal case? How was it decided? What rule of law can be deduced from the decision?
2. D, without intending to injure P but acting without due regard for his feelings, causes him great fright and mental anxiety. P sues D for damages. What decision?
3. The fright to P in the foregoing case resulted in bodily injury. What decision in an action by P against D?
4. D, through negligence, slightly injures P's person. P brings an action against D for damages and asks compensation not only for the physical injury but compensation for the mental pain which he suffered. What decision?
5. D, by his negligent conduct, frightens P so badly that the latter suffers severe physical damage. P sues D for damages. What decision?
6. How does D's conduct in the foregoing case differ from an assault?

7. What were the reasons of the court for denying a recovery in the principal case? Would not these reasons be equally strong for denying a recovery in case of an assault?
8. D, intending to play a practical joke on P, falsely told her that her husband had just been killed. Physical damage to P resulted from the mental shock. P sues D for damages. What decision?

SCRIBNER *v.* BEACH

4 Denio New York Reports 448 (1847)

Trespass for assaulting, beating and wounding the plaintiff. Plea not guilty, with notice of *son assault demesne*, and that the assault was committed in the defence of the defendant's personal property, namely, a pit of charcoal and a coal rake. The trial took place at the Greene circuit in May, 1844, before PARKER, Cir. J.

It appeared that the affair which gave rise to the action happened in August, 1842, on a piece of land in Catskill, of which the defendant had been in possession about three years before. He removed to Herkimer county and the plaintiff succeeded to the occupancy of the land, and had burned a coal pit upon it, and was engaged in taking the coal to market. While he was absent for that purpose, the defendant came to the pit and commenced raking out the coal with a rake he found there, having a wagon in readiness to take the coal away. While thus engaged the plaintiff came there and asked the defendant what he was doing. Defendant said if he came there he would show him. Upon this the plaintiff took hold of the rake with a view of taking it from the defendant, who letting go, with one hand knocked the plaintiff down. As he arose he again took hold of the rake, but the defendant pulled it away, and with it aimed a blow at the plaintiff's head, which the latter sought to prevent by putting up his hand. The rake struck his arm near the wrist and fractured the bone.

The defendant offered to show that he had title to the land upon which the coal pit was burned, which was uncultivated and unimproved; and that the coal was made from his wood cut upon that land. The plaintiff's counsel objected to this evidence, and the objection was sustained and the evidence excluded. Verdict for the plaintiff $150. The defendant moves for a new trial.

JEWETT, J. Self defence is a primary law of nature, and it is held an excuse for breaches of the peace and even for homicide itself. But care must be taken that the resistance does not exceed the bounds of mere defence, prevention or recovery, so as to become vindictive;

for then the defender would himself become the aggressor. The force used must not exceed the necessity of the case.

A man may justify an assault and battery in defence of his lands or goods, or of the goods of another delivered to him to be kept. (Hawk. P. C. b. 1, c. 60, 23.) (*Seaman* v. *Cuppledick*, Owen's R. 150.) But in these cases, unless the trespass is accompanied with violence, the owner of the land or goods will not be justified in assaulting the trespasser in the first instance, but must request him to depart or desist, and if he refuses, he should gently lay his hands on him, for the purpose of removing him, and if he resist with force, then force sufficient for the purpose of removing him may be used in return by the owner. (*Weaver* v. *Bush*, 8 Term R. 78; Butler's M. P. 19; 1 East. P. C. 406.) It is otherwise if the trespasser enter the close with force; in the case this owner may without previous request to depart or desist use violence in return, in the first instance, proportioned to the force of the trespasser, for the purpose, only of subduing his violence.

"A civil trespass," says Holroyd, J., "will not justify the firing a pistol at the trespasser, in sudden resentment or anger. If a person takes forcible possession of another's close, so as to be guilty of a breach of the peace, it is more than a trespass; so if a man with force invades and enters the dwelling house of another. But a man is not authorized to fire a pistol on every invasion or intrusion into his house; he ought, if he has a reasonable opportunity, to endeavor to remove the trespasser without having recourse to the last extremity." (*Mead's case*, 1 Lavin, C. C. 185; Roscoe's C. Ev. 262.) The rule is that in all cases of resistance to trespassers, the party resisting will be guilty in law of an assault and battery, if he resists with such violence that it would, if death had ensued, have been manslaughter. Where one manifestly intends and endeavors, by violence or surprise, to commit a felony upon a man's person (as to rob, or murder, or to commit a rape upon a woman) or upon a man's habitation or property (as arson or burglary) the person assaulted may repel force by force; and even his servant, then attendant on him, or any other person present may interpose for preventing mischief; and in the latter case, the owner, or any part of his family, or even a lodger with him, may kill the assailant, to prevent the mischief. (Foster's Crown Law, 273.)

The resumption of the possession of land and houses by the mere act of the party is frequently allowed. Thus, a person having a right to the possession of lands, may enter by force, and turn out a person

who has a mere naked possession, and cannot be made answerable in damages to a party who has no right, and is himself a *tort feasor*. Although if the entry in such case be with a strong hand, or a multitude of people, it is an offence for which the party entering must answer criminally. (*Hyatt* v. *Wood*, 4 John R. 150; *Sampson* v. *Henry*, 13 Pick. 36.)

In respect to personal property, the right of recaption exists, with the caution that it be not exercised violently, or by breach of the peace; for should these accompany the act, the party would then be answerable criminally. But the riot, or force, would not confer a right on a person who had none; nor would they subject the owner of the chattel to a restoration of it, to one who was not the owner. (*Hyatt* v. *Wood*, *supra*.) In the case of personal property, improperly detained or taken away, it may be taken from the house and custody of the wrongdoer, even without a previous request; but unless it was seized or attempted to be seized forcibly, the owner cannot justify doing anything more than gently laying his hands on the wrongdoer to recover it. (*Weaver* v. *Bush*, *supra;* Com. Dig. Pleader, 3, M. 17; *Spencer* v. *McGowen*, 13 Wend. 256.)

In one branch of the defence the defendant set up *son assault demesne*. That was overthrown by evidence showing a manifest disproportion between the battery given and the first assault. Even a wounding was proved. The defendant also relied upon a defence of his possession of certain personal property, which he insisted was invaded by the plaintiff, and in the defence of which he committed the assault. To sustain this defence he proposed to prove, that the coal pit was on new and unimproved land to which he had title, and that the wood from which the coal was made was cut from this land without any authority from him; but this evidence was rejected. The object of strife between the parties was the possession of the *rake* not the coal. The plaintiff is not shown to have committed a single act tending to disturb the defendant in his possession of the latter. The ownership of the coal, therefore, was not a material fact. But admitting that the defendant had a legal title to the coal, and that the plaintiff's object in regaining possession of the rake was to use it as a means of retaking possession of the coal, still, the defendant could not justify the *wounding* merely in defence of his possession. (*Gregory* v. *Hill*, *supra*.) Unless the plaintiff first attempted forcibly to take the coal, of which there was no proof, I think the evidence was immaterial, and was properly overruled.

New trial denied.

QUESTIONS

1. What is a felony? What is meant by arson? Burglary? Larceny? Highway robbery?
2. What was the issue under consideration in the principal case? In what form was the issue presented to the appellate court for review? How did the court decide the issue? What rule of law can be deduced from the decision?
3. D, seeing P start off with the former's watch, strikes P down without warning and retakes his watch. P sues D for damages. What decision?
4. D comes peaceably into possession of P's watch but without any right to keep it. A few days later, D by force retakes the watch from P. P sues D in an action of trespass for an assault. What decision?
5. P attempts by force to take P's watch from his person. D, in defending his property, kills P. Of what offense, if any, is D guilty?
6. To what extent may a person go in defending possession of his personal property? To what extent may he go in recapturing his personal property?
7. D finds P in possession of the land of the former. What steps may D take to remove P from the land?
8. P is threatening to come on the land of D. What steps may D take to prevent the execution of the threat?
9. How much force may one use in the defense of one's person?
10. D bought a suit of clothes from P. A controversy later arose as to whether the price agreed on was $20 or $21. D placed the suit of clothes and a twenty-dollar bill on the table and told P to make his choice. P took both and would not give up the suit unless D would pay him another dollar. D threw P down, choked him, blacked his eyes, and recovered his money. P sues D for damages. What decision?

THOMAS *v.* WINCHESTER

6 New York Reports 397 (1852)

Action in the supreme court against Winchester and Gilbert, for injuries sustained by Mrs. Thomas, from the effects of a quantity of extract of belladonna, administered to her by mistake as extract of dandelion. The defendant Gilbert was acquitted by the jury under the direction of the court, and a verdict was rendered against Winchester for $800. The defendent Winchester moved for a new trial. The motion was denied. He thereupon brought this appeal.

RUGGLES, C. J. This is an action brought to recover damages from the defendant for negligently putting up, labeling and selling as and for the extract of dandelion, which is a simple and harmless

medicine, a jar of the extract of *belladonna*, which is a deadly poison; by means of which the plaintiff Mary Ann Thomas, to whom, being sick, a dose of dandelion was prescribed by a physician, and a portion of the contents of the jar was administered as and for the extract of dandelion, was greatly injured, &c.

The facts proved were briefly these: Mrs. Thomas being in ill health, her physician prescribed for her a dose of dandelion. Her husband purchased what was believed to be the medicine prescribed, at the store of Dr. Foord, a physician and druggist in Casenovia, Madison county, where the plaintiff resides.

A small quantity of the medicine thus purchased was administered to Mrs. Thomas, on whom it produced very alarming effects; such as coldness of the surface and extremities, feebleness of circulation, spasms of the muscles, giddiness of the head, dilation of the pupils of the eyes, and a derangement of mind. She recovered, however, after some time, from its effects, although for a short time her life was thought to be in great danger. The medicine administered was *belladonna* and not dandelion. The jar from which it was taken was labeled "½ lb. dandelion, prepared by A. Gilbert, No. 108, John Street, N. Y. Jar. 9 oz." It was sold for and believed by Dr. Foord to be the extract of dandelion as labeled. Dr. Foord purchased the article as the extract of dandelion from Jas. S. Aspinwall, a druggist of New York. Aspinwall bought it of the defendant as extract of dandelion believing it to be such. The defendant was engaged at No. 108 John-street, New York, in the manufacture and sale of certain vegetable extracts for medicinal purposes, and in the purchase and sale of others. The extracts manufactured by him were put up in jars for sale, and those which he purchased were put up by himself, and those containing extracts purchased by him from others, were labeled alike. Both were labeled like the jar in question, as "prepared by A. Gilbert." Gilbert was a person employed by the defendant at a salary, as an assistant in his business. The jars were labeled in Gilbert's name because he had been previously engaged in the same business on his own account at No. 108 John-street, and probably because Gilbert's labels rendered the articles more salable. The extract contained in the jar sold to Aspinwall, and by him to Foord, was not manufactured by the defendant, but was purchased by him from another manufacturer or dealer. The extract of dandelion and the extract of belladonna resemble each other in color, consistence, smell and taste; but may on careful examination be distinguished the

one from the other by those who are well acquainted with these articles. Gilbert's labels were paid for by Winchester and used in his business with his knowledge and assent.

The case depends on the first point taken by the defendant on his motion for a nonsuit; and the question is, whether the defendant, being a remote vendor of the medicine, and there being no privity or connection between him and the plaintiffs, the action can be maintained.

If, in labeling a poisonous drug with the name of a harmless medicine, for public market, no duty was violated by the defendant, excepting that which he owed to Aspinwall, his immediate vendee, in virtue of his contract of sale, this action cannot be maintained. If A builds a wagon and sells it to B, who sells it to C, and C hires it to D, who in consequence of the gross negligence of A in building the wagon is overturned and injured, D cannot recover damages against A, the builder, A's obligation to building the wagon arises solely out of his contract with B. The public have nothing to do with it. Misfortune to third persons, not parties to the contract, would not be a natural and necessary consequence of the builder's negligence; and such negligence is not an act imminently dangerous to human life.

So, for the same reason, if a horse be defectively shod by a smith, and a person hiring the horse from the owner is thrown and injured in consequence of the smith's negligence in shoeing; the smith is not liable for the injury. The smith's duty in such case grows exclusively out of his contract with the owner of the horse; it was a duty which the smith owed to him alone, and to no one else. And although the injury to the rider may have happened in consequence of the negligence of the smith, the latter was not bound, either by his contract or by any considerations of public policy or safety, to respond for his breach of duty to any one except the person he contracted with.

This was the ground on which the case of *Winterbottom* v. *Wright* (10 Mees. & Welsb. 109) was decided. A contracted with the post-master general to provide a coach to convey the mail bags along a certain line of road, and B and others, also contracted to horse the coach along the same line. B and his co-contractors hired C, who was the plaintiff, to drive the coach. The coach, in consequence of some latent defect, broke down; the plaintiff was thrown from his seat and lamed. It was held that C could not maintain an action against A for the injury thus sustained. The reason of the decision

is best stated by Baron Rolfe. A's duty to keep the coach in good condition, was a duty to the postmaster general, with whom he made his contract, and not a duty to the driver employed by the owners of the horses.

But the case in hand stands on different ground. The defendant was a dealer in poisonous drugs. Gilbert was his agent in preparing them for market. The death or great bodily harm of some person was the natural and almost inevitable consequence of the sale of belladonna by means of the false label.

The defendant, on the trial, insisted that Aspinwall and Foord were guilty of negligence in selling the article in question for what it was represented to be in the label; and that the suit, if it could be sustained at all, should have been brought against Foord. The judge charged the jury that if they or either of them, were guilty of negligence in selling the belladonna for dandelion, the verdict must be for the defendant; and left the question of their negligence to the jury, who found on that point for the plaintiff. If the case really depended on the point thus raised, the question was properly left to the jury. But I think it did not. The defendant, by affixing the label to the jar, represented its contents to be dandelion; and to have been "prepared" by his agent Gilbert. The word "prepared" on the label, must be understood to mean that the article was manufactured by him, or that it had passed through some process under his hands, which would give him personal knowledge of its true nature and quality. Whether Foord was justified in selling the article upon the faith of the defendant's label, would have been an open question in an action by the plaintiffs against him, and I wish to be understood as giving no opinion on that point. But it seems to me to be clear that the defendant cannot, in this case, set up as a defense, that Foord sold the contents of the jar as and for what the defendant represented it to be. The label conveyed the idea distinctly to Foord that the contents of the jar was the extract of dandelion; and that the defendant knew it to be such. So far as the defendant is concerned, Foord was under no obligation to test the truth of the representation. The charge of the judge in submitting to the jury the question in relation to the negligence of Foord and Aspinwall, cannot be complained of by the defendant.

Judgment affirmed.

QUESTIONS

1. It is said that the problem involved in the principal case is one which grows out of "anonymous production." What is meant by this statement?
2. What was the issue under consideration in the principal case? How was it decided? What rule of law can be deduced from the decision?
3. What was the wrong complained of in the principal case—an assault, battery, or breach of contract?
4. Would the court have reached the same conclusion had the action been brought against Dr. Foord, the doctor and druggist?
5. D, a manufacturer of automobiles, sold ten machines to R, a retailer. R sold one to P. Because of defective wood in one of the wheels, the wheel collapsed and P was seriously injured. P sues D for damages. What decision?
6. In the foregoing case D sold one machine to R for his personal use. R sold the machine to P. P brings an action against D for damages. What decision?
7. D negligently builds a fire on his premises which spreads to P's premises and burns the latter's barn. What are P's rights, if any, against D?
8. D negligently runs over P with an automobile. What are the rights, if any, of P against D?
9. D sets a spring gun in his orchard, hoping that some thief will be shot. P, coming to steal fruit, sets the gun off and is severely wounded. What are the rights, if any, of P against D?
10. There is an obscure and dangerous pit on D's premises, of which D knows. (*a*) M, a prospective purchaser, while looking at the premises at the request of D, falls into the pit and is injured. (*b*) N, a guest of D, is injured in the same manner. (*c*) P, coming to steal fruit, suffers the same fate. What is the liability of D, if any, in each case?
11. D negligently causes the death of P. What is the liability of D to P's personal representative?

b) Security of Property

BUTLER *v.* TELEPHONE COMPANY

186 New York Reports 486 (1906)

VANN, J. The question presented by this appeal is whether ejectment will lie when the soil is not touched, but part of the space a few feet above the soil is occupied by a telephone wire unlawfully strung by the defendant across the plaintiff's premises? This question has never been passed upon by the Court of Appeals nor by the Supreme Court, except in the decision now before us for review.

Questions similar but not identical as they related to overhanging eaves, projecting cornices or leaning walls, were decided in favor of the defendant in *Aiken* v. *Benedict* (39 Barb. 400), and *Vrooman* v. *Jackson* (6 Hun, 326) and in favor of the plaintiff in *Sherry* v. *Freeking* (4 Duer, 452). In *Leprell* v. *Kleinschmidt* (112 N.Y. 364) the question as to the effect of projecting eaves was alluded to but not decided, because there was in that case "physical entry by the defendant upon the land of the plaintiffs and an unlawful detention of its possession from them."

An action of ejectment, according to the Code, is an "action to recover the immediate possession of real property." (Code Civ. Pro. Pars 3343, sub. 20.) While the statute to some extent regulates the procedure, it did not create the action and for the principles which govern it resort must be had to the common law. (Code Civ. Pro. 1496–1532; Real Property Laws 218; 2 R. S. 303.)

Without entering into the somewhat involved and perplexing learning upon the subject, it is sufficient to say that, as all the authorities agree, the plaintiff must show that he was formerly in possession, that he was ousted or deprived of possession and that he has a right to re-enter and take possession. It is admitted by the pleadings that when the wire was put up the plaintiff was in possession of the entire premises and that he was entitled to the immediate possession thereof as owner when action was commenced. The serious question is whether he was deprived of possession to the extent necessary to authorize ejectment. While ouster is essential to the maintenance of the action, it need not be entire or absolute. For it is sufficient if the defendant is in partial possession of the premises while the plaintiff is in possession of the remainder.

Mines, quarries, mineral oil and upper room in a house are familiar examples. Is the unauthorized stringing of a wire by one person over the land of another an ouster from possession to the extent that the wire occupies space above the surface as claimed by the plaintiff, or a mere trespass or interference with a right incidental to enjoyment as claimed by the defendant? Was the plaintiff in the undisturbed possession of his land when a portion of the space above it was occupied by the permanent structure of the defendant, however small? Was the space occupied by the wire part of the land in the eye of the law?

What is "real property"? What does the term include so far as the action of ejectment is concerned? The answer to these questions is found in the ancient principle of law: *Cujus est solum, ejus*

est usque ad coelum et ad inferos. The surface of the ground is a guide, but not the full measure, for within reasonable limitations land includes not only the surface but also the space above and the part beneath.

Usque ad coelum is the upper boundary, and while this may not be taken too literally, there is no limitation within the bounds of any structure yet erected by man. So far as the case before us is concerned, the plaintiff is the owner of the soil owned upward to an indefinite extent. He owned the space occupied by the wire and had the right to the exclusive possession of that space which was not personal property, but a part of his land. According to fundamental principles, and within the limitation mentioned space above land is real estate the same as the land itself. The law regards the empty space as if it were a solid, inseparable from the soil, and protects it from hostile occupation accordingly.

If the wire had touched the surface of the land in permanent and exclusive occupation, it is conceded that the plaintiff would have been dispossessed *pro tanto*. A part of his premises would not have been in his possession, but in the possession of another. The extent of the disseisin, however, does not control, for an owner is entitled to the absolute and undisturbed possession of every part of his premises, including the space above, as much as a mine beneath. If the wire had been a huge cable, several inches thick and but a foot above the ground, there would have been a difference in degree, but not in principle. Expand the wire into a beam supported by posts standing upon abutting lots without touching the surface of plaintiff's land, and the difference would still be one of degree only. Enlarge the beam into a bridge, and yet space would be occupied. Erect a house upon a bridge, and the air above the surface of the land would alone be disturbed. Where along the line of these illustrations would dispossession begin? What rule has the law to measure it by? How much of the space above the plaintiff's land must be subjected to the dominion of the defendant in order to effect dispossession? To what extent may the owner be dispossessed and kept out of his own before there is a privation of seisin? Unless the principle of *usque ad coelum* is abandoned any physical, exclusive and permanent occupation of space above land is an occupation of the land itself and a disseisin of the owner to that extent.

The authorities, both ancient and modern, with some exceptions not now important, agree that the ability of the sheriff to deliver

possession is a test of the right to maintain an action of ejectment. "The rule now is, that when the property is tangible and an entry can be made and possession be delivered to the sheriff, this action will lie." (*Nichols* v. *Lewis*, 15 Conn. 137.) The defendant insists the sheriff cannot give possession of space any more than he can deliver water in a running stream or "air whirled by the north wind." When the space above land is unoccupied there is no occasion for delivery, because there is nothing to exclude the owner from possesssion. The sheriff, however, can deliver occupied space by removing the occupying structure. All that he does to deliver possession of the surface of the land, or of a mine under the surface, is to remove either persons or things which keep the owner out. He does not carry the plaintiff upon the land and thus put him in possession, but he simply removes the obstructions which theretofore had prevented him from entering. So, in this case, that officer can deliver possession by removing the wire, the same as he would if one end happened to be imbedded in the soil, when no question as to the right to bring ejectment could arise. Where there is a visible and tangible structure by which possession is withheld to the extent of the space occupied thereby ejectment will lie, because there is a desseisin measured by the size of the obstruction, and the sheriff can physically remove the structure and thereby restore the owner to possession.

The smallness of the wire in question does not affect the controlling principle, for it was large enough to prevent the plaintiff from building to a reasonable height upon his lot. The prompt removal of the wire after the suit was brought could not defeat the action because the rights of the parties to an action at law are governed by the facts as they existed when it was commenced.

The judgment should be affirmed with costs.

QUESTIONS

1. What is the action of ejectment? What must the plaintiff prove in order to recover in this action?
2. What is meant by seisin? How does it differ from possession?
3. What is real property? How far does ownership in land extend below the surface of the earth? How far does it extend above the surface of the earth?
4. Does it appear in the principal case that any damage was being done to the plaintiff or to his property?
5. D passes over a narrow strip of land belonging to P, honestly believing that it is his own. P sues D in trespass for damages. What decision?

6. D, while riding along the road, is suddenly thrown by his horse on the land of P. P sues D in trespass for damages. What decision?
7. Are there other remedies to which the plaintiff in the principal case might have resorted?
8. D intentionally disturbs P's possession of certain personal property. P brings an action of trespass against him. D contends that he is not liable because he caused no damage to the property. What decision?
9. D negligently disturbs P in his possession of personal property. P sues D for damages. D contends that he is not liable because he did not cause any damage to the property. What decision?
10. P hires a horse from X for a period of ten days. C negligently injures the horse. Who may recover damages for the injury?

SWIM *v.* WILSON

90 California Reports 126 (1891)

DE HAVEN, J. The plaintiff was the owner of one hundred shares of stock of a mining corporation, issued to one H. B. Pearsons, trustee, and properly indorsed by him. This stock was stolen from plaintiff by an employee in his office, and delivered for sale to the defendant, who was engaged in the business of buying and selling stocks on commission. At the time of placing the stock in defendant's possession the thief represented himself as its owner, and the defendant relying upon this representation in good faith and without notice that the stock was stolen, sold the same in the usual course of business, and subsequently, still without notice that the person for whom he had acted in making the sale was not the true owner, paid over to him the net proceeds of such sale. Thereafter the plaintiff brought this action to recover the value of the stock, alleging that the defendant had converted the same to his own use, and the facts as stated above appearing, the court in which the action was tried gave judgment against the defendant for such value, and from this judgment, and an order refusing him a new trial, the defendant appeals.

It is clear that the defendant's principal did not, by stealing plaintiff's property, acquire any legal right to sell it, and it is equally clear that the defendant, acting for him, and as his agent, did not have any greater right, and his act was therefore wholly unauthorized, and in law was a conversion of plaintiff's property.

"It is no defense to an action of trover that the defendant acted as the agent of another. If the principal is a wrong-doer, the agent is wrong-doer also. A person is guilty of conversion who sells the

property of another without authority from the owner, notwithstanding he acts under authority of one claiming to be owner, and is ignorant of such person's want of title."

To hold the defendant liable, under the circumstances disclosed here, may seem upon first impression to be a hardship upon him. But it is a matter of every day experience that one cannot always be perfectly secure from loss in his dealings with others, and the defendant here is only in the position of a person who has trusted to the honesty of another and has been deceived. He undertook to act as agent for one who, it now appears, was a thief, and, relying on his representations, aided his principal to convert the plaintiff's property into money, and it is no greater hardship to require him to pay to the plaintiff its value than it would be to take the same away from the innocent vendee, who purchased and paid for it. And yet it is universally held that the purchaser of stolen chattels, no matter how innocent or free from negligence in the matter, acquires no title to such property as against the owner; and this rule has been applied in this court to the case of an innocent purchaser of shares of stock. (*Barrow* v. *Savage Mining Co.*, 64 Cal. 388; 49 Am. Rep. 705; *Sherwood* v. *Meadow Valley Mining Company*, 50 Cal. 412.)

Indeed, we discover no difference in principle between the case at bar and that of *Rogers* v. *Huie*, 1 Cal. 429, 54 Am. Dec. 300, in which case, Bennett, J., speaking for the court, said: "An auctioneer who receives and sells stolen property is liable for the conversion to the same extent as any other merchant or individual. This is so both upon principle and authority. Upon principle, there is no reason why he should be exempted from liability. The person to whom he sells, and who has paid the amount of the purchase-money, would be compelled to deliver the property of the true owner or pay him its full value; and there is no more hardship in requiring the auctioneer to account for the value of the goods, than there would be in compelling the right owner to lose them, or the purchaser from the auctioneer to pay for them."

It is true that this same case afterwards came before the court and it was held, in an opinion reported in 2 Cal. 571, that an auctioneer who in the regular course of his business receives and sells stolen goods, and pays over the proceeds to the felon, without notice that the goods were stolen, is not liable to the true owner as for a conversion. This latter decision, however, cannot be sustained on principle, is opposed to the great weight of authority, and has been practically overruled

in the later case of *Crekel* v. *Waterman*, 62 Cal. 34. In that case the defendants, who were commission merchants, sold a quantity of wheat, supposing it to be the property of one Williams, and paid over to him the proceeds of the sale, before they knew of the claim of the plaintiff in that action. There was no fraud or bad faith, but the court held the defendants there liable for the conversion of the wheat.

It was the duty of the defendant in this case to know for whom he acted, and, unless he was willing to take the chances of loss, he ought to have satisfied himself that his principal was able to save him harmless if in the matter of his agency he incurred a personal liability by the conversion of property not belonging to such principal.

Judgment and order affirmed and rehearing denied.

QUESTIONS

1. What action did the plaintiff bring in the principal case? What must the plaintiff prove in order to recover in this action?
2. What was the issue under consideration in the principal case? How was this issue decided? What rule of law can be deduced from the decision?
3. Suppose that the plaintiff had brought an action against the person who stole the stock from him, what would the decision have been? What action would he have brought?
4. Does the defendant in this case have any remedy over against the thief? If so, what remedy does he have?
5. What was the act of conversion of which the defendant was guilty? Did the defendant make any claim of title or interest in the property for himself?
6. T steals property from P and absconds with it. P brings an action of trover against T for the conversion of the property. What decision?
7. T throws the property aside. D picks it up and claims it as his own and refuses to return to P on demand. P sues him in trover. What decision?
8. D sells the same property to B, a bona fide puchaser for value without notice of the theft. P sues B in trover for conversion of the property. What decision?
9. P turns his horse over to D for safekeeping. D so misuses the horse that it dies. P sues D in an action of trover for conversion of the horse. What decision?
10. P delivers stock to D for safekeeping and promises to compensate D for his services. D negligently loses the stock. P sues D for conversion of the stock. What decision?
11. P, without permission, left his automobile in D's garage. (*a*) D sells it. (*b*) D lends it to a friend for a few days. (*c*) He uses it

himself from time to time. P sues D in trover for conversion of the machine. What decision?

12. P, without permission, put his horse in D's pasture. D turned the horse out and it was stolen. P sues D in trover. What decision?
13. D is driving cattle along the highway to market when a steer, belonging to P, without D's knowledge, joins the herd and is sold by D with his own cattle. P sues D in trover. What decision?
14. What forms of property may be converted? Can money be converted? Stocks? Bonds? Bills? Checks? Choses-in-action?

STEELE *v.* MARSICANO

102 California Reports 666 (1894)

Appeal from a judgment of the Superior Court of the City and County of San Francisco in favor of the plaintiffs, and from an order denying a new trial.

HARRISON, J. The defendant carries on the business of packing fruit at a warehouse on Battery street, in San Francisco, under the name of Overland Packing Company, and is also the president of the American Salt Company, and has his office, or headquarters, at the office of that corporation, on Sacramento Street, in that city. On March 19, 1892, a man named Laton visited the office of the salt company, and inquired for the defendant, saying that he wished to store some sugar with him at his place on Sacramento Street, in that city. The defendant was absent from San Francisco, and the clerk in charge told him that they had no room, and on his inquiring, whether he could store it with the Overland Packing Company for a few days, the clerk at his request, knowing that he was an acquaintance of the defendant, telephoned the inquiry to that place, and received an affirmative reply. Laton then visted the Overland Packing Company's place, and, upon seeing where the sugar was to be stored, said he would send it up. He then went to the office of the plaintiffs, representing himself to be a broker for the defendant, and negotiated the purchase in his name of twenty-one tons of sugar, and directed that it be delivered to the Overland Packing Company. The plaintiffs employed their own draymen for that purpose, and when he reached the packing company's place on Battery Street, the foreman of that place and one of the men took it on the trucks and ran it into the building, and a receipt for its delivery was given to the drayman in the name of the Overland Packing Company. The sugar was delivered on the 22nd day of March but the defendant

did not learn of its delivery until two days thereafter, when he immediately directed his foreman to tell Laton to take the sugar away, which he did, and Laton removed the sugar the next day. On the Monday following, which was collection day, the defendant received from the plaintiffs a statement of his account or purchase of the sugar, and immediately visted the office of the plaintiffs, and denied having made such a purchase. The record does not show whether the plaintiffs made any record of the transaction with Laton, or what steps they took to investigate the transaction, but they seem to have become satisfied that the purchase of the sugar had not been authorized by the defendant, as instead of bringing an action against the defendant for its value, they made formal demand upon him about two weeks later for its redelivery and then brought this action charging him with the conversion of the sugar. Judgment was rendered in the court below in favor of the plaintiffs, and the defendant has appealed.

In order to charge the defendant with the conversion of the plaintiff's goods, he must be shown to have done some act implying the exercise or assumption of title, or of a dominion over the goods, or some act inconsistent with the plaintiff's right or ownership, or in repudiation of such right. A simple act of intermeddling with another's property which does not imply an assertion of title or dominion over the property, and which is done in ignorance of the owner's claims thereto, and without intention to deprive him of it, will not constitute a coversion. If I find a horse in my lot I am not guilty of its conversion if I turn it into the highway, nor is the warehouseman who received goods from a wrong doer and afterwards redelivers them to him in ignorance of the claim of another, guilty of their conversion. Conversion is a tort, and to establish it there must be a tortious act. "If a bailee have the temporary possession of property, holding the same as the property of the bailor, and asserting no title in himself, and in good faith in fulfillment of the terms of the bailment, either as expressed by the parties or implied by law, restores the property to the bailor before he is notified that the true owner will look to him for it, no action will lie against him, for he has only done what was his duty." (*Nelson* v. *Iverson*, 17 Ala. 216.) See also, *Burditt* v. *Lombard*, 100 Mass. 408, where the defendant took possession of a warehouse in which there was certain cotton belonging to the plaintiff, but which the defendant, upon information to that effect received from his predecessor, entered

upon his books as belonging to another, to whom he subsequently delivered it, it was held that he was not liable for its conversion. In *Hill* v. *Hays*, 38 Conn., 532, some stolen money had been delivered to the defendant by the thief, to be kept for him. The defendant had no knowledge that the money had been stolen, and in a few days gave it to a third party to be redelivered to her bailor, but it was held that she was not guilty of conversion. See also, *Frome* v. *Dennis*, 45 N. L. 515; *Loring* v. *Mulachy*, 3 Allen 575; *Gurley* v. *Armstead*, 148 Mass. 267; 12 am. St. Rep. 555.

A demand of the property and a refusal to redeliver it do not of themselves constitute a conversion. They are merely evidence from which a conversion may be established, and, as evidence, may be repelled by proof that a compliance was impossible. (*Hill* v. *Covell* 1 N.Y. 522.) A refusal, is not evidence of conversion unless the party had it in his power at the time to deliver up the goods. In order to establish the conversion by mere proof of the demand and the refusal, the plaintiff must also show the ability of the defendant to comply with the demand at the time it is made. (*Whitney* v. *Slauson*, 30 Barb. 276; *Johnson* v. *Couillard*, 4 Allen 446.)

Under these principles, the judgment against the defendant cannot be sustained. As Laton had no authority to negotiate a purchase of the sugar for the defendant, the plaintiffs do not rely upon his pretending agency, but seek to charge the defendant with its conversion by reason of the acts done by himself, claiming that the delivery of the sugar to the defendant, and his subsequent refusal to redeliver it upon their demand, constitute such a conversion; but the delivery of the sugar to the defendant was not the result of any act of authority on his part. It was delivered there at the instance of Laton, and must be considered as a delivery to Laton. As Laton had no authority to bind the defendant, his direction to the plaintiffs to deliver the sugar at the defendant's place of business and their delivery in pursuance thereof, cannot create any obligation against the defendant in reference to the sugar. The taking of a receipt in the name of the Overland Company is immaterial. It did not establish any relation of contract between the plaintiffs and the defendant; for it was shown by the plaintiffs that the delivery was made at the instance of Laton, and there was nothing in the receipt which indicated that the delivery was made in pursuance of the purchase on behalf of the defendant. The receipt was only a voucher to Laton that the plaintiffs had followed his direction, and had the same

effect as though the sugar had been placed on board a vessel for transportation, or in some other warehouse, for which a drayman's receipt was given. It could not place the defendant under any obligation to the plaintiffs, for at the time of its delivery there was no statement on the part of the plaintiffs of the purpose with which it was brought to his place, and the defendant was justified in supposing that it was the sugar which Laton had requested might be placed there for a few days.

The defendant must be considered as having received the sugar from Laton, and as his bailee. Before the defendant had any knowledge of the relation of the plaintiffs to the sugar, Laton had removed it from the defendant's packing-house at the direction of the defendant. This direction and the removal, instead of being the exercise of any dominion or control over the sugar by the defendant, was for the purpose of avoiding its control and freeing himself from any connection with it. It was restoring the sugar into the hands and under the control of the party by whom it had been placed upon his property, and was the reverse of assuming any dominion or claim to it. When subsequently the defendant visited the plaintiff's place of business in response to the bill for the sugar which they had sent him, and disclaimed the purchase, the plaintiffs do not seem to have acquainted him with the facts of the transaction, and did not question his declaration that he had not made the purchase until some two weeks later, when they made a formal demand for its delivery. As at this time it was not in his power to comply with the demand, his refusal did not constitute a conversion, and as none of the previous acts done by him with reference to the sugar had been in the assertion of any dominion over it, or with any knowledge of the plaintiff's rights, or from which any repudiation of their rights could be implied, he could not be charged with the conversion.

The judgment and order are reversed.

QUESTIONS

1. What act or acts were relied upon by the plaintiff in the principal case to establish a conversion of the sugar by the defendant? Was there not an unlawful dealing with the sugar by the defendant? If so, why was he not held liable in trover?
2. X delivers property to D for safekeeping. Later P notifies D that the property is his. Notwithstanding the notice, D returns the property to X. P sues D in trover for conversion of the property. Assuming that P can show title to the property, what decision?

3. In the foregoing case, D refuses to return the property to either P or X until he has reasonable time within which to investigate their respective claims. P, the owner of the property, sues D in trover. What decision?
4. D finds a watch which belongs to P. P, without making any demand for his property, sues D in trover. What decision?
5. P delivers a horse to D to be returned when P shall demand it. P demands the return of the horse which D ignores. P sues D in trover for the conversion of the horse. What decision?
6. D is in possession of P's horse and honestly believes that he owns it. P demands possession of the horse which D ignores. P sues D in trover. What decision?
7. D repairs an automobile for P and refuses to return the machine until P has paid the charges for the repairs. P sues D in trover. What decision?
8. P owed D for gasoline and for repairs to his automobile. He demanded possession of his machine from D without tendering payment for the repair charges. D said to him: "I will not let you have your car until you have paid me for the gas for which you owe." P sued D in trover for the conversion of the car. What decision?

LAVERTY *v.* SNETHEN

68 New York Reports 522 (1877)

Appeal from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, affirming a judgment of the General Term of the Marine Court of the city of New York, which affirmed a judgment in favor of the plaintiff, entered upon verdict.

This action was for the alleged conversion of a promissory note, the property of plaintiff, made by one Holly, payable to plaintiff's order.

CHURCH, C. J. The defendant received a promissory note from the plaintiff made by a third person and indorsed by the plaintiff, and gave a receipt therefor, stating that it was received for negotiation, and the note to be returned the next day or the avails thereof. The plaintiff testified in substance that he told the defendant not to let the note go out of his reach without receiving the money. The defendant, after negotiating with one Foote about buying the note, delivered the note to him under the promise that he would get it discounted, and return the money to the defendant, and he took away the note to be discounted but appropriated the avails to his own use.

The court charged that if the jury believed the evidence of the plaintiff in respect to instructing the defendant not to part with the possession of the note, the act of the defendant in delivering the note and allowing Foote to take it away, was a conversion in law, and the plaintiff was entitled to recover. The exception has been criticised as applying to two propositions, one of which was unobjectionable, and therefore not available.

Although not so precise as is desirable, I think that the exception was intended to apply to the proposition above stated, and was sufficient.

The question as to when an agent is liable in trover for conversion is sometimes difficult. The more usual liability of an agent to the principal, is an action of assumpsit or what was formerly termed an action on the case for neglect or misconduct, but there are cases when trover is the proper remedy. Conversion is defined to be an unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights. A constructive conversion takes place when a person does such acts in reference to the goods of another as amount in law to appropriation of the property to himself. Every unauthorized taking of personal property, and all intermeddling with it, beyond the extent of the authority conferred, in case a limited authority has been given, with intent so to apply and dispose of it as to alter its condition or interfere with the owner's dominion, is a conversion. (Bouv. Law. Dict., title Conversion.)

In this case the plaintiff placed the note in the hands of the defendant not only for a special purpose, but with restricted authority, as we must assume from the verdict of the jury, not to part with the possession of the note without receiving the money. The delivery to Foote was unauthorized and wrongful, because contrary to the express directions of the owner. The plaintff was entitled to the absolute dominion over this property as owner. He had the right to part with so much of that dominion as he pleased. He did part with so much of it as would justify the defendant in delivering it for the money in hand, but not otherwise. The act of permitting the note to go out of his possession and beyond his reach was an act which he had no legal right to do. It was an unlawful interference with the plaintiff's property which resulted in loss, and that interference and disposition constituted, within the general principles referred to, a conversion, and the authorities I think sustain this conclusion by a decided

weight of adjudication. A leading case is *Syeds* v. *Hay* (4 T.R., 206), where it was held that trover would likewise lie against the master of a vessel who had landed goods of the plaintiff contrary to the plaintiff's orders, though the plaintiff might have had them by sending for them and paying the wharfage. Butler, J., said: "If one man who is instrusted with the goods of another put them into the hands of a third person, contrary to orders, it is a conversion." This case has been repeatedly cited by the courts of this state as good law, and has never to my knowledge been disapproved, although it has been distinguished from another class of cases upon which the defendant relies, and which will be hereafter noticed.

The cases most strongly relied upon by the learned counsel for the appellant are *Dufresne* v. *Hutchinson* (3 Taunt. 117) and *Sarjeant* v. *Blunt* (16 J. R. 73) holding that a broker or an agent is not liable in trover for selling property at a price below instructions. The distinction in the two classes of cases, I apprehend, is that in the latter the broker or agent did nothing with property but what he was authorized to do. He had a right to sell and deliver the property. He disobeyed instructions as to price only, and was liable for misconduct, but not for conversion of the property, a distinction which in a practical sense, may seem technical, but it is founded probably upon the distinction between an unauthorized interference with the property itself, and the avails or terms of sale. At all events the distinction is fully recognized and settled by authority. In the last case Spencer J. distinguished it from *Syeds* v. *Hay*. He said: "In the case of *Syeds* v. *Hay* (4 Term R. 260), the captain disobeyed his orders in delivering the goods. He had no right to touch them for the purpose of delivering them on that wharf."

The defendant had a right to sell the note, and if he had sold it at a less price than that stipulated, he could not have been liable in this action, but he had no right to deliver the note to Foote to take away, any more than he had to pay his own debt with it. Morally, there might be a difference, but in law both acts would be a conversion, each exercising an unauthorized dominion over the plaintiff's property. *Palmer* v. *Jarmain* (2 M. & W. 282) is plainly distinguishable. There the agent was authorized to get the note discounted, which he did, and appropriated the avails. Parker, B. said: "The defendant did nothing with the bill which he was not authorized to do." So in *Cairnes* v. *Bleecker* (12 J. R. 300), where an agent was authorized to deliver goods on adequate security, it was held that

trover would not lie, for the reason that the question of the sufficiency of the security was a matter of judgment. In *McMorris* v. *Simpson* (21 Wend., 610), Bronson, J., lays down the rule that the action of trover may be maintained when the agent has wrongfully converted the property of his principal to his own use, and the fact of conversion may be made out by showing either a demand and a refusal, or that the agent has without necessity sold or otherwise disposed of the property contrary to his instructions. When an agent wrongfully refuses to surrender the goods of his principal, or wholly departs from his authority in disposing of them he makes the property his own and may be treated as a *tort-feasor*. The result of the authorities is that if the agent parts with the property in a way or for a purpose not authorized, he is liable for a conversion, but if he parts with it in accordance with his authority, although at less price, or if he misapplies the avails, or takes inadequate for sufficient security, he is not liable for a conversion of the property, but only in an action on the case for misconduct. It follows that here there was no error in the charge. The question of good faith is not involved. A wrongful intent is not an essential element of the conversion. It is sufficient if the owner has been deprived of his property by the act of another assuming an unauthorized dominion and control over it. It is also insisted that the parol evidence of instructions not to part with the note was incompetent to vary the terms of the contract contained in the receipt. This evidence was not only not objected to, but the point was not taken in any manner. The attention of the court was not called to it, and the court made no decision in respect to it. Under these circumstances, it must be deemed to have been waived, and is not available upon appeal. But if an exception had been taken, I am inclined to the opinion that the testimony was competent. It is not claimed that it varies that part of the receipt which contains an agreement to return the note or the money the next day, but that it varies the clause stating that the note was received for negotiation. This expresses the purpose of receiving the note, and if deemed a contract, can it be said that a parol mandate not to part with possession of the note before sale and receipt of money is inconsistent with it?

There is no rule of law which gives an agent the right thus to part with a promissory note under the mere authority to negotiate. The instructions were consistent with the purpose expressed, although if they had not been given, a wider field of inquiry might have been

opened. A promissory note passes from hand to hand, and a bona fide holder is protected in his title, and it might well be claimed that an authority to sell would not ordinarily justify a delivery to a third person without a sale. Without definitely passing upon this question, we think that the question should have been in some form presented at the trial. In a moral sense the defendant may have acted in good faith, and hence the judgement may operate harshly upon him, but the fact found by the jury renders him liable in this action.

The judgment must be affirmed.

QUESTIONS

1. What was the act of conversion relied upon in this case to establish the liabilty of the defendant? Did the defendant assert any claim or interest in the property for himself?
2. Does it appear that the defendant was moved by any wrongful intent in doing what he did? Is wrongful intent necessary to make out a conversion of personal property?
3. What duty did the defendant violate in the principal case? How did this duty originate?
4. Would the plaintiff have had any other remedy against the defendant in this case?
5. What would have been the decision in case the plaintiff had been suing Foote for the conversion of the note?
6. P delivered a horse to D, his agent, to sell for an amount not less than $250. (*a*) D exchanged the horse for other property. (*b*) He sold the horse for $200. In an action of trover, what decision in each case?
7. P instructed D to sell shares of stock and to take good security for the part of the purchase price not paid in cash. (*a*) D misappropriated the cash payment which he received for the stock. (*b*) He failed to take any security whatever for the balance of the purchase price. P sued D in trover for conversion of the stock. What decision under each hypothesis?
8. D hired a horse from P to ride to X. (*a*) He drove the horse so strenuously that the horse died. (*b*) He went to Y instead of going to X. (*c*) He used the horse for plowing. In an action of trover, what decision in each case?
9. P delivered a piano to D's warehouse for storage. D, without consent, moved the piano to another warehouse in a more hazardous part of the city. The warehouse and its contents were totally destroyed by fire. P sued D for conversion of the piano. What decision?

10. X leased his automobile to P for a period of six months. During the six months, T stole the machine from P. (*a*) P sued T in an action of trover. (*b*) X sued T in trover. What decision in each action?
11. P sues D in trover for the conversion of a horse and recovers. (*a*) What does P get by his judgment? (*b*) After judgment to whom does the horse belong?

MEDBURY *v.* WATSON

6 Metcalf's Massachusetts Reports 246 (1843)

Trespass upon the case for an alleged false and fraudulent affirmation by the defendant respecting the value of a certain tannery, which the plaintiffs were thereby induced to purchase at a greater price than it was worth. The jury found a verdict for plaintiffs. The defendant moved for a new trial and in arrest of judgment.

HUBBARD, J. The allegations are in substance these: that the plaintiffs, wishing to purchase a tannery for the purpose of carrying on a joint business in the making and vending of leather, inquired of the defendant, if he could inform them where they could purchase such an establishment; that the defendant, intending to deceive and defraud them and to induce them to purchase a tannery in Worthington belonging to one Thomas D. Wasson, and to give a much greater sum for it than it was worth, falsely asserted and affirmed to them, that he knew of such a tannery as they wanted, belonging to Thomas D. Wasson, who was ready to sell it, and that it could be purchased for $4,000, being the same sum which said Thomas D. paid one James Wasson for it; and that he would aid the plaintiffs in making the purchase; at the same time knowing that Thomas D. Wasson paid only $3,000 for it, and that it was not worth that sum at the time when Thomas D. purchased, nor at the time of his (the defendant's) making the false representation; that he wrongfully and deceitfully encouraged them to make the purchase, and pay for it a much larger price than it was worth, namely, $4,000; and that the plaintiffs, confiding in his false assertions and affirmations, and believing them to be true, and being ignorant of the value of the property, made the purchase, &c. The evidence fully sustained all the allegations in the writ; but the question is, whether these facts as thus alleged and proved, are in themselves actionable.

The action on the case for deceit is one well known; and, for a long series of years, has been maintained in the English courts. It has also been sustained as an efficient means for the punishment

of frauds, and for the protection of the weak and the ignorant against the designs and artifices of the crafty.

The leading case, in modern times, on the subject of false affirmations made with intent to deceive, is that of *Pasley* v. *Freeman*, 3 T.R. 51, in which it was decided that a false affirmation, made by the defendant with intent to defraud the plaintiff, whereby the plaintiff received damage, was the ground of an action upon the case in the nature of deceit; and that it was not necessary that the defendant should be benefited by the deceit, or that he should collude with the person who received the benefit. This case, though much contested, and though often attempted to be shaken, has received the sanction of successive decisions in Westminster Hall and in the courts of different states in this country. It has, indeed, been modified by the act of 9 Geo. 4, c. 14, commonly called Lord Tenterden's act, so far as to require the assertions, in regard to the credit of a third person, to be in writing, before the party can be charged on his false affirmation; and the law has been modified in like manner here, by St. 1834, c. 182, sec. 5, and by the Rev. Sts. c. 74, sec. 3. The great principle, however, on which that case rests, has not been disturbed, but is, indeed, sanctioned by the very statutory provisions and limitations in respect to it.

But in actions on the case for deceit, founded upon false affirmations, there has always existed the exception, that naked assertions, though known to be false, are not in the ground of action, as between vendor and vendee; and in regard to affirmations and representations respecting real estate, the maxim of *caveat emptor* has ever been held to apply. When, therefore, a vendor of real estate affirms to the vendee that his estate is worth so much, that he gave so much for it, or that he has been offered so much for it, or has refused such a sum for it; such assertions, though known by him to be false, and though uttered with a view to deceive, are not actionable. They are the mere affirmations of the vendor, on which the vendee cannot safely place confidence, and will not excuse his neglect in not examining for himself, and ascertaining what the facts are, and what credit is to be given to the assertions. But even this is qualified by one of the more ancient decisions: As where a vendor had falsely affirmed as to the amount for which the estate rented, and had induced a person to give a higher price for the estate in consequence of such false affirmation respecting the rent, there an action was held to lie, on the ground that it was a matter within his own knowledge, and the tenant might

not disclose the amount of rent paid by him. *Elkins* v. *Tresham*, 1 Lev. 102; 1 Sid. 146. And so fraudulent misrepresentations of particulars in relation to the estate, which the buyer has not equal means of knowing and where he is induced to forbear inquiries that he otherwise would have made, are not to be viewed in the light of assertions *gratis dicta;* and therefore where damage ensues, the party guilty of the fraud will be liable for the injury sustained.

I do not think it necessary to go over, in detail, the authorities cited by the counsel for the defendant, they having often been the subject of comment; but I presume I am safe in affirming that the greater part, if not all, the cases cited, are those of false affirmation by the vendor to the vendee, where the maxim *caveat emptor* applies, and not those resting upon the false representations of a third person with regard to the value of the property. And the distinction between the two cases is marked and obvious. In the one, the buyer is aware of his position; he is dealing with the owner of the property, whose aim is to secure a good price, and whose interest is to put a high estimate upon his estate, and whose great object is to induce the purchaser to make the purchase; while in the other, the man who makes the false assertions has apparently no object to gain; he stands in the situation of a disinterested person, in the light of a friend, who has no motive nor intention to depart from the truth, and who thus throws the vendee off his guard, and exposes him to be misled by the deceitful representations.

In the present case, we think the averments in the declaration would not have supported an action, if the false representations had been made by the vendor to the vendees. But the representations were made by a third person, apparently disinterested, and who proposed to aid the plaintiffs in making the purchase, and to procure the estate for them for a price which he stated he knew that it cost, and which he affirmed it was worth. Such false affirmations and representations, having been made by a third person, with the intent to defraud, we hold are actionable; and though the declaration might have contained a more full averment of the facts expected to be proved, yet we are of opinion that sufficient was stated to maintain the action, and to let in the other proofs connected with and growing directly out of the assertions set forth in the declaration.

For these reasons, the motions for a new trial, and in arrest of judgment, are overruled, and there must be

Judgment on the verdict.

QUESTIONS

1. What action was brought by the plaintiff in the principal case? With what offense was the defendant charged in the action? What are the elements of this offense?
2. What specific interest is protected by the rules of law laid down by the principal case?
3. Does it appear that the defendant received any benefit from his false representations? Should a defendant be relieved of responsibility in such a case by showing that he did not profit by his fraud?
4. D falsely represented to P that a certain tannery was worth $4,000. P bought the tannery in reliance on the statement. He sues D for damages, proving that the property was worth only $2,500 and that D knew it was worth no more when he made the representation in question. What decision?
5. D represented that Blackacre cost him $4,000. D knew when he made the statement that it was false. P in reliance on the statement purchased the land. P sued D for damages, proving that the land cost D only $3,000 and that it was worth only $2,500. What decision?
6. D induced P to buy Blackacre by a statement that the land would produce thirty bushels of corn to the acre. The statement was false to D's knowledge when he made it. P sues D for damages. What decision?
7. D induced P to buy bonds by a statement that they were "A No. 1." D made the statement with knowledge that it was false. P sues D for damages. What decision?
8. D represents to P that Blackacre contains 300 acres of land. The statement is false to D's knowledge. P in reliance on it buys the land. What are P's rights against D?
9. D buys goods from P, promising to pay for them in thirty days. At the time of the transaction, D knows that he is hopelessly insolvent. What are P's rights against D?
10. D induced P to buy stock in X Company by a statement that M, a well-known person, was owner of X stock. D did not tell P, however, that M's stock was given to him. What are P's rights against D?
11. D offered to sell P a mule. P started into the stall to examine the mule, when D said: "I would not go in, if I were you, he sometimes kicks." P sues D for damages. He shows that the mule was lame at the time of the transaction and that D knew it. What decision?
12. D represented to P that the X Company was a legal organization and entitled to issue stock. P, in reliance on the statement, bought ten shares of X stock. P sues D in deceit and proves that D knew his statement was false when he made it. What are P's rights against D?

BULLITT *v.* FARRAR

42 Minnesota Reports 8 (1889)

Plaintiff brought this action in the district court for Ramsey county, to recover damages for alleged fraudulent representations made by defendant on November 4, 1886, when selling (as agent for the owner) lot 11, block 2, in Haldeman's addition to St. Paul. The defendant's request for instruction, which was refused, is stated in the opinion. The plaintiff had a verdict of $425, and appeals from an order granting a new trial.

COLLINS, J. Action to recover damages for deceit in the sale of a city lot. As claimed by plaintiff, the deceit consisted in false and fraudulent statements and representations made by the defendant—who made the sale as the agent or broker of another person—as to the grade of the lot. The plaintiff obtained a verdict, and his appeal is from an order granting defendant's motion for a new trial. There is nothing in the record tending to indicate that the court below did not consider each of the grounds urged in defendant's motion, viz., that the verdict was not justified by the evidence, and that error in law occurred upon the trial, which was duly excepted to; but it seems evident that a new trial was granted because the court was of the opinion that it had erred in refusing to charge the jury upon defendant's request, as follows: "First. In order to entitle the plaintiff to recover in this action you must find that the defendant made to the plaintiff the representations alleged in the complaint, and that at the time of making such representations the defendant knew they were false or, having no knowledge of their truth or falsity, he did not believe them to be true, or that, having no knowledge of their truth or falsity, he yet represented them to be true of his own knowledge."

It will be seen, upon an examination of *Humphrey* v. *Merriam*, 32 Minn. 197, that the principal portion of this request was taken bodily from the opinion in that case, which, on the facts, was wholly different from the one at bar. There the deceit consisted, as claimed by the plaintiff, in false and fraudulent representations made by defendant's agent, making the sale of mining stock, as to the value, condition, and productiveness of a mine, and as to the company's indebtedness. From the plaintiff's own showing, the agent had never been at the mine, and hence had no personal knowledge of its character or condition, but made his statements from reports received and information derived from others; all of which was known by the

plaintiff. The testimony, in the judgment of the court, entirely failed to show that this agent knew the representations to be false, or that he did not honestly believe them to be true, or that he misstated the extent or sources of his information. Under such a showing it was held that the plaintiff could not recover. Here, however, according to the allegations of the complaint, the deceit consisted of positive and unqualified statements made by the defendant, amounting almost to a warranty, that the lot in question was not more than seven feet below street grade in front, and was above said grade in the rear; and the plaintiff's proofs tended to support the unequivocal allegation of his complaint on this point. So far as the rules of law laid down in *Humphrey* v. *Merriam* were pertinent to the facts then in hand, they were correctly stated, but the one bearing upon the case now before us may appear somewhat narrow and misleading when applied to other and different circumstances. As was said, the intent to deceive must exist, and must be proved, in every case. If it is absent, there can be no fraud. In this case the defendant claims that he had no knowledge of the facts, and there was no testimony indicating that he had. Therefore he did not know his statements, assuming them to have been made as contended by plaintiff, to be false, nor was it shown that he did not believe them to be true, save as they might be inferred from the fact that he seems to have had no knowledge upon the subject. But, under the circumstances of this case, and from the plaintiff's testimony as to what was said by defendant when plaintiff bought the lot, which is considered by us as a positive and unequivocal assertion in regard to the grade made as of the defendant's own knowledge, the request to charge, rejected by the court, which included the proposition that, having no knowledge of the truth or falsity of the alleged statements, a recovery could not be had unless the defendant represented the statements to be true of his own knowledge, might, if given, have misled the jury. It might have been understood as prohibiting a recovery unless it appeared that the defendant had unqualifiedly declared himself possessed of knowledge—had asserted in so many words that he knew his statements to be the truth. Positive assertion of knowledge is not required. If a man makes an untrue representation of a material fact as of his own knowledge, not knowing whether it is true or false, it is a fraud. The falsehood is intentional. And an unqualified affirmation amounts to an affirmation as of one's own knowledge. *Stone* v. *Denny*, 4 Met. 151; *Wilder* v. *De Cou*, 18 Minn. 421, (470). The fraud is as great

as if the party knew his statement to be untrue. It is, in law, a wilful falsehood for a man to assert, as of his own knowledge, a matter of which he has no knowledge. Kerr, Fraud & M. 54. A charge of fraudulent intent in an action for deceit may be maintained by proof of a statement, made as of the party's own knowledge, which is false, provided the thing stated is not merely a matter of opinion, estimate, or judgment, but is susceptible of actual knowledge; and in such case it is not necessary to make proof of an actual intent to deceive. *Chatham Furnace Co.* v. *Moffat*, 147 Mass. 403, (18 N.E. Rep. 168), and cases cited. If the false representations are made as of one's own knowledge, or unqualifiedly, being such as might and did mislead, they are unjustifiable and fraudulent. *Merriam* v. *Pine City Lumber Co.*, 23 Minn. 314. As the language used in the request might have been construed by the jury as confining them to a consideration of statements whereby the defendant expressly represented that he knew the grade of the lot (of which there was no testimony), and eliminated all consideration of affirmations wherein the defendant, without asserting actual knowledge in express terms, assumed to have it and to speak from it, or intended to and did convey the impression that he had actual knowledge of the truth, though conscious that he did not, the court was right in declining so to instruct the jury.

Although the general charge might have been more explicit and exact, it fairly covered the law applicable to the testimony and no part of it was erroneous. Among other matters, the court said, the defendant excepting, that if the jury found from the evidence that the statements and representations complained of were made as claimed by plaintiff,—that is, if they were positive and unequivocal assertions as to the grade of the lot,—it made no difference whether the defendant knew the real facts or not. This was correct. Whether the representations were made innocently, or knowingly, they would equally operate as fraud upon the plaintiff, provided they were made unqualifiedly, or as of defendant's own knowledge. *Merriam* v. *Pine City Lumber Co.* supra. It is fraudulent to affirm what is false, knowing it to be false. It is equally fraudulent to affirm what is false, knowing that the affirmation is of the existence of a fact about which one is in entire ignorance. *Wilder* v. *De Cou*, supra.

Order reversed.

QUESTIONS

1. What was the nature of the action brought by the plaintiff in the principal case?
2. Against whom was the action brought? Why was it brought against this person? Did the plaintiff have a cause of action against any other person?
3. D stated to P that Blackacre contained 500 acres of land, honestly believing that he knew what he was talking about. P, relying on the statement, bought the tract of land. P sues D and proves that Blackacre contains only 425 acres. What decision?
4. D does not know how many acres there are in Blackacre but honestly thinks that there are 500 in it. He tells P that the tract contains 500 acres. P buys the land and finds that there are only 425 acres in the tract. What are P's rights against D?
5. D does not know how many acres Blackacre contains but asserts to P, without any belief in the statement, that it contains 500 acres. What are P's rights against D?
6. D knows that there are only 425 acres in the tract but tells P that there are 500 acres in it. What are the rights of P against D?

HENRY *v.* DENNIS

95 Maine Reports 24 (1901)

These are two actions on the case to recover damages for false and fraudulent representations of the defendant in relation to the Gardiner Woolen Company, as set forth in two writs and two declarations claiming upon two distinct and separate accounts. The cases were tried together by direction of the court. Verdict and judgment for plaintiffs. The defendant alleges exceptions.

WISWELL, C. J. For some time prior to May 1, 1896, Henry, the plaintiff in one of these suits, had been engaged in the wool business alone, under the name of W. S. Henry, Jr. & Co. On that day he formed a copartnership in the same business with one Charles C. Parsons and the business was subsequently carried on in the firm name of Henry & Parsons. But after the formation of the firm, Mr. Henry continued his individual business, in the name of W. S. Henry, Jr. & Co., to the extent of selling from time to time a quantity of wool which he had on hand at the time of the formation of the copartnership.

On August 15, 1896, after the formation of the firm of Henry & Parsons, but while Mr. Henry was still selling on his own account the wool which he previously had on hand and which had not been

turned over to the firm, Henry wrote a letter to the Gardiner Woolen Company, in which he referred to an order for wool just received and in which he says: "At Mr. W. D. Eaton's request we sent you the little lot without any knowledge of your financial standing, but if we are to continue to ship you wool on 60 days time, we feel justified in informing ourselves in that respect and we presume that you would prefer to have us inquire directly of you than of outside parties. Will you kindly favor us with full particulars which we trust will warrant a continuation of our business relations to our mutual benefits." This letter was dictated by Mr. Henry, as shown by the letter, but was signed in the name of W. S. Henry, Jr. & Co.

In reply to this letter of inquiry, the defendant, to whom the letter was turned over for reply, under date of August 24, 1896, wrote a letter directed to W. S. Henry & Co., which, it is claimed, contained false and material representations as to the financial standing and condition of the Gardiner Woolen Company, which were subsequently acted upon by Mr. Henry, both individually and as a member of the firm of Henry & Parson, by making sales to the Woolen Company on credit, upon his own account and upon that of the firm. The plaintiffs, Henry in one case and Henry & Parsons in the other, being unable to collect of the Woolen Company the amounts due them, because of its insolvency, brought these two actions to recover for the injuries sustained by them by reason of the alleged misrepresentations of the defendant.

The two cases were tried together and the jury found against the defendant in both cases. The only question now presented by the exception is, whether or not the representations contained in the defendant's letter directed to W. S. Henry & Co. could have been so acted upon and relied upon by Mr. Henry as a member of the firm of Henry & Parsons, that the defendant would be liable to that firm for any injury sustained by it on account thereof, as well as to Henry individually for any injury sustained by him for the same reason.

It is urged in behalf of the defendant that he should not be and is not liable to the firm of Henry & Parsons for any misrepresentations contained in that letter, because the letter was not directed to the firm and because there was no privity between it and the defendant. The case shows that the defendant did not know of the existence of Mr. Parsons or of the firm of Henry & Parsons. But Henry was the active member of the firm and the one who made these sales upon credit to the Woolen Company, and the jury must have found

that Henry was induced to make these sales upon credit, both for himself and for the firm, by the representations contained in the defendant's letter, and that in making the sales and in extending credit to the company, both individually and as a member of the firm, he relied upon these representations.

No authority exactly in point has been called to our attention, but the general principles relative to the liability of a person for injuries caused by such misrepresentations, are well settled. One who makes a misrepresentation must, to render himself liable, have made it with the intention that it should be acted upon by the person to whom it is made or by one to whom he intended it should be communicated, and he is therefore responsible to such persons only as it was intended for.

It is a general rule that a person cannot complain of false representations, for the purpose of maintaining an action of deceit, unless the representations are either made directly to him, with the intention that they should be acted upon by him, or made to another person with the intention that they should be communicated to him and acted upon by him. A representation made to one person with the intention that it shall reach the ears of another and be acted upon by him, and which does reach him, and is acted upon by him to his injury, gives the person so acting upon it the same right to relief or redress as if it had been made to him directly. *Hunnewell* v. *Duxbury*, 154 Mass. 286; *Nash* v. *Minn. Title Ins. & Trust Co.*, 159 Mass. 437.

Applying these general principles to the particular question here involved, we think that the defendant is liable to the firm for such injury as it suffered in consequence of the misrepresentations contained in his letter, whereby the firm was induced to make sales of its goods to the Woolen Company upon credit. The answer of the defendant to the letter of inquiry was directed to a firm, its object was to obtain credit for the Woolen Company from a firm of which Henry was a member. True, the defendant did not know that Parson was associated in business with Henry, nor did he know, so far as the case shows, that Henry was also doing business alone under a firm name. But he must have contemplated that the contents of his letter would either be communicated to other members of any firm of which Henry was a partner, in that business, and be acted upon by the firm, or that Henry, acting for a firm, would be induced by his letter to give credit to the Woolen Company. The letter was not only intended for Henry, but as well for those associated with him in that business.

It is of no consequence that the letter was directed to W. S. Henry & Co., when it was in fact relied upon by Henry as a member of the firm of Henry & Parsons. It is not necessary, in order for a defendant to be liable for the consequences of his misrepresentations, that he should know the names of the persons to whom the misrepresentations may be communicated, provided he contemplated that they should be communicated to others and be acted upon by them.

Here, as the case shows, Henry, to whom the misrepresentation was directly made, was induced thereby, as a member of the firm of Henry & Parsons, to sell the firm's goods on credit, and thereby the firm suffered. This is precisely what was within the intention of the defendant, he is consequently liable therefor. This result is in accordance with the ruling of the court at the trial.

Exceptions overruled.

QUESTIONS

1. What issue was involved in the principal case? How was it decided? What rule of law can be deduced from the decision?
2. D, attempting to sell stock in the X Company to P, tells him that the company has a thousand acres of mineral lands. D knows that the statement is false. P buys stock of the company. He sues D for damages. What decision?
3. B overhears D's statement to P and buys stock in the company. What decision in an action of deceit by B against D?
4. P tells C, his friend, what D said. C buys stock. What decision in an action by C against D?
5. D states to a mercantile agency that he is the sole owner of a certain business. The agency communicates this information to P who extends credit to D in reliance on it. P sues D in deceit and proves that D knew when he made the statement to the agency that he was not the owner of the business in question. What decision?
6. P writes to the agency for information about D. Before P receives a reply he has already extended credit to D. D later becomes insolvent and unable to pay P. P sues him in deceit. What decision?
7. D, knowing that the statement is false, tells P that a certain horse is sound in all respects. As a matter of fact P can see that the horse is blind in one eye. Nevertheless P buys the horse. What are P's rights, if any, against D?
8. D was trying to sell P a pair of eyeglasses. He told P that they had been treated by a chemical which gave them such a quality that when once fitted they would always adapt themselves to the wearer's eyes. P, a somewhat gullible person, believed the statement and bought the glasses. He sued D in deceit for damages. What decision?

9. D induced P to buy stock in the X Company by a statement that M, an influential citizen, owned stock in the corporation. D knew the statement was false and made it with intent to deceive P. P sued D in deceit. D proved that the stock was worth just as much as if M had owned stock in the corporation. What decision?

10. D, knowing that the statement was false, told P that the X Company owned a thousand acres of mineral lands. P bought ten shares of stock in the corporation at $100 a share. The stock was actually worth $85 a share. If D's statement had been true, the stock would have been worth $125 a share. P sued D for damages. If P is entitled to judgment, what is the measure of his damages?

DOOLING *v.* PUBLISHING CO.

144 Massachusetts Reports 258 (1887)

Tort, for an alleged libel, containing the following words: "Probably never in the history of the Ancient and Honorable Artillery Company was a more satisfactory unsatisfactory dinner served than that of Monday last. One would suppose, from the elaborate bill of fare, that a sumptuous dinner would be furnished by the caterer, Dooling; but instead, a wretched dinner was served, and in such a way that even hungry barbarians might justly object. The cigars were simply vile, and the wines not much better."

At the trial in the Superior Court, before Pitman, J., the publication of the words by the defendant was admitted.

The plaintiff's counsel, in opening the case to the jury, stated that the plaintiff was a caterer in the city of Boston with a very large business, and acted as caterer upon the occasion referred to. Upon the statement of the plaintiff's counsel that he should offer no evidence of special damage, the judge ruled, without reference to any question of privilege that might be involved in the case, that the words set forth were not actionable *per se*, and that the plaintiff could not maintain his action without proof of special damage; and, the plaintiff's counsel still stating that he should offer no evidence of special damage, directed a verdict for the defendant; and reported the case for the determination of this court.

If the ruling was correct, judgment was to be entered on the verdict; otherwise, the case to stand for a new trial.

C. ALLEN, J. The question is, whether the language used imports, any personal reflection upon the plaintiff in the conduct of his business, or whether it is merely in disparagement of the dinner which he

provided. Words relating merely to the quality of articles made, produced, furnished, or sold by a person, though false and malicious, are not actionable without special damage. For example, the condemnation of books, paintings, and other works of art, music, architecture, and generally of the product of one's labor, skill, or genius, may be unsparing, but it is not actionable without the averment and proof of special damage, unless it goes further, and attacks the individual. Disparagement of property may involve an imputation on personal character or conduct, and the question may be nice, in a particular case, whether or not the words extend so far as to be libelous, as in *Bignell* v. *Buzzard*, 3 H. & N. 217.

The old case of *Fen* v. *Dixie*, W. Jones, 444, is much in point. The plaintiff there was a brewer, and the defendant spoke of his beer in terms of disparagement at least as strong as those used by the present defendant in respect to the plaintiff's dinner, wines, and cigars; but the action failed for want of proof of special damage.

In *Evans* v. *Harlow*, 5 Q. B. 624, 631, Lord Denman, C. J., said: "A tradesman offering goods for sale exposes himself to observations of this kind; and it is not by averring them to be 'false, scandalous, malicious, and defamatory,' that the plaintiff can found a charge of libel upon them."

In the present case there was no libel on the plaintiff, in the way of business. Though the language used was somewhat strong, it amounts only to a condemnation of the dinner and its accompaniments. No lack of good faith, no violation of agreement, no promise that the dinner should be of a particular quality, no habit of providing dinners which the plaintiff knew to be bad, is charged, ncr even an excess of price beyond what the dinner was worth; but the charge was, in effect, simply that the plaintiff, being a caterer, on a single occasion, provided a very poor dinner, vile cigars, and bad wines. Such a charge is not actionable without proof of special damage.

Judgment on the verdict.

QUESTIONS

1. What was the nature of the action brought in the principal case? What was the offense with which the defendant was charged? Specifically what interest does the law seek to protect in providing a remedy like the one under consideration in this case?
2. What other facts should the plaintiff have alleged and proved to establish the liability of the defendant? Why did he not allege and prove these additional facts?

3. Suppose that the defendant had said, "This is the third time that Dooling has given us a dirty deal on a dinner," would the decision of the court have been the same?
4. D said to X: "Last week I bought badly spoiled meat from P, the butcher." X immediately ceased buying meat from P. P sued D for damages. D offered evidence tending to show that P did sell him badly spoiled meat. On the objection of P, the evidence was excluded. D excepted. Judgment was given for P. D alleged exceptions. What decision?
5. D said to P: "The meat you sold me yesterday was badly spoiled." P sued D for damages. D demurred to the declaration. What judgment on the demurrer?
6. D, in an advertisement, said: "My soothing syrup is the best on the market." P, a rival manufacturer of soothing syrup brought an action against D for damages. He offered evidence tending to prove that D's statement was false and that he, P, suffered special damages by its publication. Should the evidence be admitted?
7. D said in his adverisement: "My soothing syrup is the best on the market. All other soothing syrups contain a greater or lesser quantity of opium. *A word to the wise is sufficient.*" P brought an action against D for damages and offered evidence tending to prove that his syrup did not contain opium and that he had suffered special damages because of D's statement. The court excluded the evidence and gave judgment for the defendant. P alleged exceptions. What decision?
8. X asked D, a physician, about P's soothing syrup. D said: "P's soothing syrup contains opium and is dangerous." The statement was false although D honestly believed what he said. P sued D for damages. What decision?
9. D, a retail shoe dealer, made this remark to X: "I sell the only shoes of quality in the city." P, the only other dealer in the same town, brought an action for damages. He offered evidence tending to show that D's statement was false. Should the evidence be admitted?
10. D, while attempting to sell a pair of shoes to X, said: "Believe me or not, but every other shoe dealer in this town sells shoes with pasteboard soles." D's statement was false although he honestly believed that he spoke the truth. P, a rival shoe dealer, sued D for damages and showed that he had suffered special damages by reason of the false statement. What decision?
11. X, a customer of D, asked him what he thought of the shoes of P, a rival shoe dealer. D said, "P is an honest dealer, but unfortunately he handles a poor grade of shoes. The leather in them is very inferior and the welters are made of a mixture of rotten leather and paper." The statement was false although D honestly believed that it was true. P sued D for damages. What decision?

CARDON *v.* McCONNELL

120 North Carolina Reports 461 (1897)

Civil action, for damages for slander of plaintiff's title, whereby he lost an opportunity to make an advantageous sale of land, tried before Bryan J., and a jury, at Fall Term, 1896, of Clay Superior Court. On the trial, and after the plaintiff's evidence was closed, his Honor intimated that plaintiff could not recover and plaintiff took a non-suit and appealed.

FAIRCLOTH, C. J. This action is for slandering title to real property. The plaintiff alleges that he had title and had negotiated a good sale when the defendant interfered and falsely and maliciously misrepresented the plaintiff's title, and on that account the plaintiff's sale failed and he was damaged. The defendant averred that he had an interest in the land; that he, in good faith, asserted his claim and sold his interest to another party. The deed, relied upon as divesting the defendant's interest in the land, contains these words in the *habendun* clause: "To have and to hold to the said Ledford, his heirs and assigns forever, together with all the woods, waters and one-half of the minerals, etc."

At the close of the plaintiff's evidence the court held that he could not recover, among other reasons, because there was not sufficient evidence to sustain the second issue, which was in these words: "Did the defendant falsely and maliciously interfere with the plaintiff's sale to A. H. Isbell or his assigns and falsely and maliciously slander the plaintiff's title as alleged?" We express no opinion on the title, as the case turns upon the sufficiency of the evidence in support of the second issue.

Slander of title of property may be committed and published orally or by writing, printing or otherwise, and the gist of the action is the special damage sustained, and unless the plaintiff shows the falsity of the words published, the malicious intent with which they were uttered, and a pecuniary loss or injury to himself, he cannot maintain the action. If the alleged infirmity of the title exists, the action will not lie, however malicious the intent to injure may have been, because no one can be punished in damage for speaking the truth. It is essential to the action that the words be maliciously uttered and with intent to injure, and the burden of proving such malice, express or implied, rests upon the plaintiff. If he can show that the utterances were not made in good faith to assert a real claim of title, or facts and cir-

cumstances that warrant such an inference, then malice may be fairly implied.

If the defendant should assert title to the property in question or to some interest therein, which turned out to be unfounded, malice will not be presumed from such a fact, because malice must be shown as a substantive fact. It is the duty of one, believing that he has such a claim or interest, to proclaim and assert it when a sale is in contemplation by another, in order that innocent persons may not be deceived or misled to their injury. If one be inquired of, he must speak the truth as he understands it and believes it to be. If he is present at a public sale of property claimed by himself, he must speak for the protection of the purchasers or he will be forever estopped. If, at last, upon investigation, the defendant fails to show any title or interest in possession or remainder, still, if his acts were done in good faith at the time he spoke, no action will lie. The plaintiff, claiming damages, must show malice—that there was no probable cause for the defendant's belief—that he could not have honestly entertained such belief. The prevention of a sale by the assertion of a claim by A, although unfounded, is not actionable unless it be knowingly bottomed on fraud.

Looking carefully at the evidence, we agree with his Honor that there was not evidence of falsehood and malice sufficient to be submitted to the jury.

Affirmed.

QUESTIONS

1. What is the nature of the action which the plaintiff brought in the principal case? With what offense was the defendant charged in this action? What are the essential elements of this offense?
2. What is meant by the statement that the plaintiff took a non-suit and appealed? Why did he take a non-suit?
3. Did the defendant have any title or claim to the land in question? If not, why was the plaintiff not given judgment?
4. P is the owner of Blackacre and is negotiating a sale of it to X. D tells X that he has a mortgage on the property. He knows that his statement is false and makes it simply for the purpose of vexing P, whom he thoroughly dislikes. X refuses to buy the land because of D's statement. P sues D for damages. What decision?
5. In the foregoing case, D has no such interest but honestly believes that he has and in good faith makes an assertion of interest to X. X refuses to buy the land. P sues D for damages. What decision?
6. D has an interest in the land and asserts his claim to X. He makes the claim not so much to protect his own interest but primarily to harass

and vex P. X refuses to buy the land. P sues for damages. What decision?

7. D, honestly but erroneously, believes that Y has an interest in the land and so asserts to X. X refuses to buy the land. P sues D for damages. What decision?
8. D has no interest in the land but in bad faith tells X that he has. X ignores the false statement and buys the land. (*a*) P sues D for damages. (*b*) X sues D for damages. What decision in each case?

c) Security of Reputation

TIMES PUBLISHING COMPANY *v.* CARLISLE

94 Federal Reports 761 (1899)

SANBORN, Circuit Judge, after stating the facts delivered the opinion of the court: "A good name is rather to be chosen than great riches, and loving favor rather than silver and gold." The respect and esteem of his fellows are among the highest rewards of a well-spent life vouchsafed to man in this existence. The hope of them is the inspiration of his youth, and their possession the solace of his later years. A man of affairs, a business man, who has been seen and known of his fellowmen in the active pursuits of life for many years and who has developed a good character and an unblemished reputation, has secured a possession more useful and more valuable than lands, or houses, or silver, or gold. Taxation may confiscate his lands; fire may burn his houses; thieves may steal his money; but his good name, his fair reputation, ought to go with him to the end—a ready shield against the attacks of his enemies, and a powerful aid in the competition and strife of daily life.

The law recognizes the value of a good reputation and constantly strives to give redress for its injury. It imposes upon him who attacks it by slanderous words, or by a libelous publication, a liability to make full compensation for the damage to the reputation, for the shame and obloquy, and for the injury to the feelings of its owner, which are caused by the publication of the slander or libel. It goes further. If the words are spoken, or the publication is made, with the intent to injure the victim, or with a criminal indifference to civil obligations, it imposes such damages as a jury, in view of all the circumstances of the particular case, adjudge that the wrongdoer ought to pay, as an example to the public, to deter others from committing like offenses, and as a punishment for the infliction of the injury.

QUESTIONS

1. What is meant by defamation? Slander? Libel?
2. What is the difference between civil and criminal libel?
3. What interest is protected by the rules of law, collectively known as Defamation?
4. What form of action does a plaintiff use when he sues for damages arising out of an actionable libel?
5. What, in general, are the essential elements of an actionable defamation?
6. D writes and publishes the following statement: "All lawyers are thieves and all doctors are quacks." Who, if any one, can recover damages from D?

SHEFFILL *v.* VAN DEUSEN

13 Gray's Massachusetts Reports 304 (1859).

Action of tort for slander. Trial in the court of common pleas, before Briggs, who signed this bill of exceptions:

"The words claimed to have been slanderous were spoken, if at all, at the dwelling house of the defendants, and in that part thereof called the bakery, where bread and other articles were sold to customers; and were spoken by Mrs. Van Deusen to Mrs. Sheffill.

The defendants asked the court to instruct the jury that if the words alleged in the plaintiff's declaration were spoken to Mrs. Sheffill, and no other person but Mrs. Sheffill and Mrs. Van Deusen were present, there was no such publication of the words as would maintain the action.

The court declined so to instruct, but did instruct the jury that if the words were publicly uttered in the bakery of the defendants, there was sufficient publication, though the plaintiff has not shown that any other person was present at the time they were spoken, but Mrs. Sheffill and Mrs. Van Deusen. The jury returned a verdict for the plaintiffs, and the defendants except."

BIGELOW, J. Proof of the publication of the defamatory words alleged in the declaration was essential to the maintenance of this action. Slander consists in uttering words to the injury of a person's reputation. No such injury is done when the words are uttered only to the person concerning whom they are spoken, no one else being present, or within hearing. It is damage done to character in the opinion of other men, and not in a party's self-estimation, which constitutes the material element in an action for verbal slander. Even in a civil action for libel, evidence that the defendant wrote

and sent a sealed letter to the plaintiff, containing defamatory matter, was held insufficient proof of publication; although it would be otherwise in an indictment for libel, because such writings tend directly to a breach of the peace. So too it must be shown that the words were spoken in the presence of some one who understood them. If spoken in a foreign language, which no one present understands, no action will lie therefore.

It is quite immaterial, in the present case, that the words were spoken in a public place. The real question for the jury was, Were they so spoken as to have been heard by third persons? The defendants were therefore entitled to the instructions for which they asked.

Exceptions sustained.

QUESTIONS

1. What was the form of action brought in the principal case? With what offense were the defendants charged?
2. What instruction did the defendants ask the lower court to give to the jury? What instruction did the court actually give? What is the difference between the instruction asked for and the one given? Which is correct?
3. What is meant by the statement, "Exceptions sustained"? What exceptions were sustained? Who made the exceptions? Why did he make them? What was the effect of sustaining the exceptions?
4. D falsely tells X in French that P is a thief. X does not understand the French language. P sues D for damages. What decision?
5. D falsely tells X that P stole his, D's, horse. X knows for a fact that P did not steal the horse. P sues D for damages. What decision?
6. D falsely charges P with an act of theft. P tells X, his friend. P sues D for damages. What decision?
7. D in a letter to P falsely charges that the latter is a thief and a swindler. The letter is opened and read by P's wife. P sues D for damages. What decision?
8. In the foregoing case, the letter is opened and read by P's chief clerk. P sues D for damages. What decision?
9. The letter is opened and read by P's partner. What decision in an action by P against D?
10. P shows the letter to his wife and later, to his partner. P sues D for damages. What decision?
11. D dictates to his stenographer false, defamatory matter concerning P. P sues D for damages. What decision?
12. D mailed a letter to P, on the outside of which appeared these words, "The D Collection Agency. *Collection of Bad Debts Our Specialty.*" P sues for damages. What decision?

13. D sends to a newspaper a false, defamatory statement concerning P. The X Company publishes it. P sues D, the X Company, Y, who distributes the newspapers over the city, and Z, a newsboy who sold them. What decision in each action?

BROMAGE *v.* PROSSER

4 Barnewall and Cresswell's Reports 253 (1825)

BAYLEY, J. This was an action for slander. The plaintiffs were bankers at Monmouth, and the charge was, that in answer to a question from one Lewis Watkins, whether he, the defendant, had said that the plaintiff's bank had stopped, the defendant's answer was, "it was true, he had been told so." The evidence was, that Watkins met defendant, and said, "I hear that you say the bank of Bromage and Snead, at Monmouth, has stopped. Is it true?" Defendant said, "Yes it is; I was told so." He added, "it was so reported at Crickhowell, and nobody would take their bills, and that he had come to town in consequence of it himself." Watkins said, "You had better take care what you say, you first brought the news to town, and told Mr. John Thomas of it." Defendant repeated, "I was told so." Defendant had been told at Crickhowell, that there was a run upon plaintiff's bank, but not that it had stopped, or that nobody would take their bills, and what he said was greatly beyond what he had heard. The learned judge considered the words as proved, and he does not appear to have treated it as a case of privileged communication; but as the defendant did not appear to be actuated by any ill will against the plaintiffs, he told the jury that if they thought the words were not spoken maliciously, though they might unfortunately have produced injury to the plaintiffs, the defendant ought to have their verdict; but if they thought them spoken maliciously, they should find for the plaintiff; and the jury found for the defendant; the question upon a motion for a new trial was upon the propriety of this direction.

If in an ordinary case of slander (not a case of privileged communication), want of malice is a question of fact for the consideration of the jury, the direction was right; but if in such case the law implies such malice as is necessary to maintain the action, it is the duty of the judge to withdraw the question of malice from the consideration of the jury; and it appears to us that the direction in this case was wrong. That malice, in some sense, is the gist of the action, and that therefore the *manner and occasion of speaking the words* is admissible in evidence

to show they were not spoken *with malice*, is said to have been agreed (either by all the judges, or at least by the court who thought the truth might be given in evidence on the general issue), in *Smith* v. *Richerdson* Willes, 24; and it is laid down 1 Com. Dig. action upon the case for defamation G5. that the declaration must show a malicious intent in the defendants, and there are some other very useful elementary books in which it is said that malice is the gist of the action, but in what sense the word malice or malicious intent are here to be understood, whether in the popular sense, or in the sense the law puts upon those expressions none of these authorities state. Malice in common acceptation means ill will against a person, but in its legal sense it means a wrongful act, done intentionally, without just cause of excuse. If I give a perfect stranger a blow likely to produce death, I do it of malice, because I do it intentionally, and without just cause or excuse. If I maim cattle, without knowing whose they are, if I poison a fishery, without knowing the owner, I do it of malice, because it is a wrongful act and done intentionally. If I am arraigned of felony and willfully stand mute, I am said to do it of malice because it is intentioned and without just cause or excuse. And if I traduce a man whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice because it is wrongful and intentional. It equally works an injury, whether I meant to produce an injury or not, and if I had no legal excuse for the slander, why is he not to have a remedy against me for the injury it produces? And I apprehend the law recognizes the distinction between these two descriptions of malice in fact and malice in law—in actions of slander. In an ordinary action for words, it is sufficient to charge that the defendant spoke them *falsely*, it is not necessary to state that they were spoken *maliciously*. We, therefore, think that we cannot properly refuse a new trial, upon the ground that the result upon the trial might have been doubtful. In granting a new trial, however, the court does not mean to say that it may not be proper to put the question of malice as a question of fact for the consideration of the jury, for if the jury should think that when Watkins asked his question the defendant understood it was asked in order to obtain information to regulate his own conduct, it will range under the cases of privileged communication, and the question of malice, in fact, will then be a necessary part of the jury's inquiry; but it does not appear that it was left to the jury in this case, to consider whether this was understood by the defendant as an appli-

cation to him for advice, and if not, the question of malice was improperly left to their consideration. We are, therefore, of the opinion, that the rule for a new trial must be absolute.

Rule Absolute.

QUESTIONS

1. What was the issue under consideration in the principal case? How was the issue decided? What rule of law can be deduced from the decision?
2. A new trial was granted by the court on appeal. Into what error did the trial court fall which rendered a new trial necessary?
3. What instruction did the trial court give to the jury? What instruction should it have given?
4. What is the difference between malice in law and malice in fact? What is the essence of malice in law? When must malice in fact be proved to establish an actionable slander?
5. Does it appear that the defendant in the principal case was actuated by malice in fact in saying what he did?
6. What fact or facts must be determined at the new trial before judgment can be entered for either party?
7. X falsely states to D that P is bankrupt. D, without any intention to injure P, but simply for the purpose of saying something, repeats X's statement to Y. P sues D for damages alleging the foregoing facts. D demurs to the declaration. What decision?
8. D tells a number of people that P is a thief and a swindler. The statement is false but D, honestly believing it to be true, makes it for what he conceives to be the best interest of the community. P sues D for damages. What decision?
9. X is a stockholder in the P Bank. X asks D, a bank examiner, about the condition of the bank. D falsely states that the bank is practically insolvent, honestly believing that it is. P sues D for damages. What decision?

BROW *v.* HATHAWAY

95 Massachusetts Reports 239 (1866)

Tort for slander. The declaration contained two counts, and the words set forth as slanderous were as follows: "You (meaning the plaintiff) entered our shop and took fifty-eight dollars worth of goods." "She (meaning the plaintiff) took the goods and has stolen other things before. She stole the goods we missed." "My wife accuses Josephine of entering her shop with a key Monday night, and taking fifty-eight dollars worth of goods." "When we took account of the

stock, I accused her to my wife of taking two hundred dollars worth, either in goods or money." "If I do not (meaning if I do not lose any more goods) I shall certainly say it was Josephine; and if I do, I shall say it was her." "There has been as good a girl as she was, as far as I know, accused of stealing and owned up to it." "There have been a great number of innocent persons convicted without doubt, and you might be." "When we took account of stock, I accused her then to my wife of taking to the amount of two hundred dollars's worth, either in goods or money, and told her it was time to discharge Josephine, and go into the front part of the shop herself."

The answer denied the speaking of the words, and set forth, among other things, that the defendant's wife was engaged in business in Fall River, and he was interested therein with her, and the plaintiff had been employed by her in the business, and various articles and sums of money had been missed from the shop; and, if the defendant spoke the words, they were spoken in good faith, without malice, for the sake of public justice, in the prosecution of an inquiry into a suspected crime, in matters where his interest was concerned, to enable him to protect his interest, in the belief that they were true.

The jury returned a verdict for the plaintiff, with $498.28 damages; and the defendant alleged exceptions.

WELLS, J. The defendant's wife having lost goods from her store, and having grounds to suspect that the plaintiff had stolen them, the defendant applied to the chief of police, and at his suggestion, went with a police officer to the house where the plaintiff resided with her mother, to make inquiry into the matter. No search-warrant was taken, but a search was made by permission of the mother and the plaintiff. No stolen goods were found. This proceeding had no authority of law, but with the assent of the mother and the plaintiff there was no impropriety in it; and there is nothing in the case to show that it was resorted to, or that the attendance of the police officer was procured, otherwise than in good faith and to secure a proper investigation for the discovery of the stolen goods.

The words alleged as slanderous were spoken by the defendant on that occasion, in reply to the inquiry of the mother as to "what they wanted," and in explanation of their visit. They all related to the subject matter of the supposed theft, and the grounds which the defendant had to suspect the plaintiff. This statement furnished the conditions which establish the legal position of "privilege"

rebutting the presumption of malice which the law would otherwise imply, and making it incumbent upon the plaintiff to show malice in fact in order to recover.

The broad general principle is carefully stated in the case of *Toogood* v. *Spyring* 4 Tyrwh. 582, which is referred to in nearly all the later decisions upon this subject, and its doctrines have been quoted and approved by this court in *Swan* v. *Tappan*, 5 Cush. 104, and *Gassett* v. *Gilbert* 6 Gray, 94. A narrower statement, applicable to the facts of the present case is made by Lord Ellemborough in *Delany* v. *Jones*, 4 Espl. 91, namely: "If done *bona fide*, as with a view of investigating a fact, in which the party making it is interested, it is not libelous." In *Blackham* v. *Pugh*, 2 C.B. 620 Chief Justice Tindell says: "A communication made by a person immediately concerned in interest in the subject matter to which it relates, for the purpose of protecting his own interest, in the full belief that the communication is true and without any malicious motive, is held to be excused from responsibility."

This "privilege" is not defeated by the mere fact that the statements were made in the presence of others than the parties immediately interested; nor that they were intemperate or excessive from over excitement. *Toogood* v. *Spyring*, cited above; *Dunman* v. *Bigg*, 1 Camp. 269.

Whether the subject matter to which the communication relates, the interest in it of the party making them or his relations to it, are such as to furnish the excuse, is a question to be determined by the court, in the first instance, assuming that they were made in good faith in the belief that they were true, and with no motive of malice.

If unnecessary publicity be given to the statements, or if they go beyond what is reasonable in imputing crime, these circumstances may tend to show malice in fact; as well as evidence that the defendant knew them to be false, or had no sufficient reason to believe them true, or that he improperly sought or used the occasion to utter the defamatory words. But however strong the evidence from these sources may be, and however irresistible the conclusion of malice to be drawn therefrom, it is a conclusion of fact, and is to be drawn by the jury, and not by the court. The judge who tried this case instructed the jury that if the defendant used the words alleged, he was liable, "although he may have believed them to be true and may have had no malicious design to defame the plaintiff." This ruling, as it seems must have been based upon the ground, either that the occasion was

not one which furnished the excuse of "privilege" or that the defendant had, by some abuse of the privilege lost the benefit of its protection. If upon the former ground, we think it was wrong as matter of law, both upon the authorities and upon principle. If upon the latter, it was a question not for the court, but for the jury.

This case must be distinguished from those in which the party pleading the excuse of "privilege" is guilty of making use of the occasion to utter charges of character foreign to its legitimate purpose. As, for instance, if this defendant had, in addition to his statements in relation to the supposed theft, gone on to criminate the plaintiff generally, or to accuse her of unchastity, it would have been the duty of the court, in an action for uttering such charges, to instruct the jury that as to such words, not appropriate to the legitimate objects of the occasion, it furnished the defendant no excuse whatever. But in this case, the language all related to the subject of the theft which they were investigating and it should have been left to the jury to determine, upon all the circumstances of the case, whether the defendant was guilty of actual malice.

Exceptions sustained.

QUESTIONS

1. What issue was under consideration in the principal case? How was the issue decided? What rule of law can be deduced from the decision?
2. What is meant by the statement, "The defendant alleged exceptions"? What is meant by the statement, "Exceptions sustained"? What is the effect of sustaining the exceptions?
3. What instruction was given by the trial court to the jury? In what respect was this instruction erroneous? What should the court below have told the jury?
4. Suppose in the principal case that the defendant had known that her charges were false but had uttered them to vex and harass the plaintiff, would the decision have been the same?
5. Suppose that the defendant had walked down the street, repeating the charge to everyone she met, would the decision have been the same?
6. Suppose that the defendant had said, "This woman not only stole my property, but she is a common woman of the streets as well," would the decision have been the same?
7. X, about to employ P, asks D, a former employer of P, concerning him. D in good faith says that P is dishonest. P sues D for damages. What decision?
8. In the foregoing case, D knows that his statement is false. What decision in an action by P against D?

9. D honestly believes that P is dishonest but makes the statement primarily because he thoroughly dislikes P. What decision in an action by P against D?
10. D tells X, his partner in business, that P, their clerk, steals money from the firm. The statement is false but D honestly believes that it is true. P sues D for damages. What decision?
11. D, without being requested to do so, writes to his sister, making false charges against P, her suitor. P sues D for damages. What decision?
12. P sues D for uttering slanderous words concerning him. D offers to prove that the words are true. Should he be permitted to do so?
13. D is indicted for publishing a criminal libel concerning P. At the trial D offers to prove that the charges he made are true. Should he be permitted to do so?
14. A judge, while trying a case, calls one of the trial lawyers "a harpy, preying on the vitals of the poor." The judge does not believe the statement and makes it simply because he dislikes the lawyer. The lawyer sues the judge for damages. What decision?

KING *v.* PATTERSON

49 New Jersey Law Reports 417 (1887)

The plaintiff was engaged in the retail clothing business, at Red Bank, in the county of Monmouth. The defendants conduct a mercantile agency in the city of New York. Their business consists in collecting information as to the credit and financial standing of dealers throughout the country. Four times a year they publish a book of ratings, called "Record book" and twice in each week a notification sheet called the "mercantile agency notification sheet." In the notification sheet of November 5th, 1884 there was published this information: "New Jersey. Red Bank. Patterson, Emma. Chattel Mortgage, Samuel Ludlow, $1385. Clothing." The publication was false, and for the injury to the plaintiff's business occasioned by it this suit was brought. The plaintiff had judgment.

DEPUE, J. The suit is an action by a trader for a false statement concerning her credit, and the defence that the publication was privileged must be decided upon those legal rules that give a privilege to communications of that character.

The trial judge charged that a communication made *bona fide* upon any subject matter in which the party communicating has an interest, or in reference to which he had a duty, is privileged if made to a person having corresponding interest or duty, although it may contain

criminatory matter, which, without this privilege, would be slanderous or libelous and actionable.

The defendants were engaged of their own volition and for their profit in the business of collecting and disseminating information as to character, credit, and pecuniary responsibility of traders throughout the United States. Their course of business was to transmit a copy of the record book and semi-weekly notification sheet, containing the information they collected, to each of their subscribers, who paid the required annual subscription, and signed a contract to hold such communications as confidential, without regard to the existence or non-existence of interest to the subscribers in the information communicated. The number of subscribers to whom the record book and notification sheets were sent does not appear in the case. Mr. Dun, the principal proprietor, testified that it was impossible for him to say how many copies were issued, as there were a number of branch offices, and of the number of their subscribers he had no knowledge. Enough appeared to show that the defendant's business of collecting and disseminating information is extensive, and that the number of subscribers to whom such information is communicated is very large.

It appeared that one Myers, a creditor of the plaintiff, saw the notification sheet of November 5th, 1884, in the hands of Lisberger and Weiss Co., merchants doing business in Philadelphia, and that Lyons, another creditor, saw another copy of it on the desk of Simons & Company, in New York City. In consequence of the information contained in the sheet, Myers and Lyons went to Red Bank and demanded payment or security for their debts. The plaintiff's credit was destroyed, and her business was broken up. Myers and Lyons were not subscribers of the defendants. Lisberger and Weiss had, some two years before, sold goods to the plaintiff, but the account was closed at that time. It did not appear that Simons & Company, ever had any dealings with the plaintiff. Neither of these persons had, at the time the sheet was published, any business interest in the credit or financial standing of the plaintiff.

The trial judge applied the rule of law he adopted by an instruction in these words: "Had, then, Lisberger & Weiss an interest in knowing the financial condition and solvency of the plaintiff? Or had Simon & Co., in New York, such interest? Or had either party, the defendants, or Lisberger & Weiss, or Simon & Company, a duty with reference to the condition of the business affairs as between themselves?

If they had, then such communication, made *bona fide*, with the guard by contract and other stipulation between the parties appearing in evidence, would be privileged. If there were no such interest or duty between the defendants and these subscribers, then they may be liable, as the publication was not privileged as to them, or to others who obtained it through them. If a request was made, either express or implied, by Lisberger & Weiss, or by Simon & Co., for such communication as to the plaintiff, then, if they had no such interest in the matter, the book or sheet sent to them, or either of them, affecting her credit, would not be privileged. If made without such request, then the communication voluntarily sent by them must be at their risk as to the harm that may be done thereby. I think it is enough to hold, in this case, that the agency has the protection of the privilege in every case where the subscriber has a direct and personal interest in the person who is the subject matter of inquiry, and that in all other cases they must stand as others, on the truthfulness of their report, and their protection under the contracts with subscribers not to divulge the secrets of their business."

The defendants' dissemination of the notification sheets among their subscribers as a class, being intentional and in the regular course of their business as it was conducted, it is not necessary to consider whether *Tompson* v. *Dashwood*, 11 Q. B. Div. 43, in which it was held that a communication intended to be made on a privileged occasion was privileged, where, by the sender's negligence in putting letters in wrong envelopes, the communication was sent to a stranger to the occasion, was correctly decided. It will be observed that in *Thompson* v. *Dashwood* the misdirected letter was sent to the plaintiff's brother, and in fact caused no injury to the plaintiff. It may be remarked also that Mr. Pollock, in his recent treatise on Torts, disapproves of this case as a decision by no means universally accepted by the profession as good law, and as contrary to the earlier decisions. (*Pollock on Torts*, 216, 234.) A defendant intends to send a communication derogatory to the plaintiff's character or circumstances to A, where it would do no harm. By inadvertence, he sends it to B, which produces the injury complained of. It is obvious that it would be a plain transgression of legal principles to excuse the act he did because he intended to do an act from which no injury to the plaintiffs would have resulted, and thus visit upon an innocent sufferer the consequences of the heedless act of the wrong-doer which occasioned the injury.

The defendants can claim no additional privilege in virtue of the business in which they are engaged. Their business is a lawful business, but, as was said by the court in *Sunderlin* v. *Bradstreet*, in "its conduct and management it must be subjected to the ordinary rules of law, and its proprietors and managers held to the liability which the law attached to like acts by others." The publication of defamatory matter affecting third persons, in a business prosecuted for personal gain, can be tolerated only on grounds of public convenience. The rights of individuals ought not to be made to yield to the exigencies of such a business more than public interest require. Public interest will be adequately conserved by extending the immunity of privileged communications only so far as to embrace communications to subscribers who have a special interest in the information. This restriction lays no unreasonable restraint upon the business of the agencies in collecting and communicating information in the interest of the public. Society is organized and courts are established for the protection of the rights of individuals. Unrestrained by those legal principles which control the acts and conduct of other persons under like circumstances, these agencies, in the vastness of their operations are capable of becoming instruments of injustice and oppression so grievous that public policy would require their entire suppression.

Nor can the defendants acquire a large measure of immunity by reason of their contracts with their customers to hold the information as confidential. The contract of the defendants with their subscribers is *inter se*. In fact, it affords no protection against injury by false reports. The manner in which these reports are disseminated renders protection to the public under the terms of the subscriber's contracts a delusion. Each of the subscribers has a printed copy to retain in his possession. Myers testified that although not one of the defendants' subscribers, he nevertheless had seen their reports twice a week right along—sometimes only once a week, and sometimes twice a week; that during the last ten years he had seen their notification sheets thousands of times and that any reputable merchant could get hold of their sheets whether he is a subscriber or not. Others of the plaintiff's creditors who were not defendants' subscribers testified that they had frequently seen the defendants' sheets, and some that they had seen the sheet of November 5, 1884. The injury to the plaintiff from the false report resulted from the manner in which the defendants disseminated their publications. It has been held that damage occasioned by the unauthorized repetition by a third

person of defamatory words uttered orally is too remote to support an action against the original utterer of them, where the words are actionable only by reason of damage. *Ward* v. *Weeks*, 7 Bing. 211. This case and the cognate case of *Vicars* v. *Willcocks* have been criticized. 2 Smith's Lead. Cas. (8th ed.) 522. The principle held in that case, if sound, has never been applied to written or printed libels, nor is it applicable to defamatory matter published in that manner. The correct principle to apply to such publications is that the original publisher is answerable in law for all the consequences of his wrongful act which were reasonably to be foreseen, and which were the result, in the usual order of things, of such wrongful act. *Huges* v. *McDonough* 14 Vroom 460; Pollock on Torts 462.

The rule adopted by the learned judge in defining the qualifications and limitations upon publications affecting credit and financial standing, which would make such publications privileged communications, was correct. His application of the rule to the facts of this case was as favorable to the defendants as they were entitled to have. His ruling with respect to the liability of the defendants for damages resulting from their wrongful act was also correct.

The other exceptions have been examined. It is sufficient to say that we find in them no error which would justify a reversal.

The judgment for plaintiff should be affirmed.

QUESTIONS

1. What issue was under consideration in the principal case? How was this issue decided? What rule of law can be deduced from the decision?
2. What instructions did the trial court give to the jury? How did it apply them to the facts of this case?
3. What is meant by a privilege communication? What is the difference between a conditional privilege and an absolute privilege? What kind of a privilege did the defendant claim in this case?
4. Does this decision proceed upon the theory that the defendants had no privilege or that in this particular case they exceeded their privilege?
5. X is contemplating a sale of goods to P on credit. He receives an unsolicited letter from D, telling him that P is on the verge of bankruptcy. X refuses to consummate the sale. The statement is false but honestly made. P sues for damages. What decision?
6. X asks D as to the financial condition of P. D reports that P is practically insolvent. D is mistaken but makes the statement in good faith. P sues D for damages. What decision?
7. X receives an unsolicited letter from D to the effect that P is insolvent. P is actually insolvent but D communicated the information to X not

because he is interested in X but simply for the purpose of injuring P. P sues D for damages. What decision?

8. D writes a letter to P, making certain false, defamatory remarks about the latter. By mistake he places the letter in the wrong envelope and sends it to X who opens and reads it. P sues D for damages. What decision?
9. D publicly states that P is a drunkard. The statement is utterly false but no one belives it. P sues D for damages. What decision?
10. D publicly states that P habitually attends "the races" when he goes to the city. The statement is false. P sues D for damages. D contends that he is not liable unless P alleges and proves special damages. What decision?

FRED *v.* TRAYLOR

115 Kentucky Reports 94 (1903)

HOBSON, J. Appellant and appellee are both millers in Lincoln county. Appellant filed this suit against appellee to recover damages for slander, charging that the latter had said of him as a miller to one of his customers falsely and maliciously, and for the purpose of injuring him in his business, as such, the following: "Dudderar, what do you want for your wheat?" Dudderar answered: "I won't price it until I see Fred (appellant), as I have given him the refusal of it." Appellee replied: "Well, you won't want to price it to Fred but once when he beats you out of as much as he beat me out of. He just beat me out of $1,100 in three months." Appellee in one paragraph of the answer denied that the words were spoken of the plaintiff as miller, and in the other paragraph he alleged the truth of the words. On the trial, at the conclusion of the evidence for the plaintiff, the court instructed the jury peremptorily to find for the defendant. This instruction was given on the ground that, although it appeared from the evidence that appellant had been for many years a miller, in the year 1900 for three months he kept an exchange in the town of Stanford in the employ of appellee, at which he exchanged flour and meal for wheat and corn, and sold the products of the mill for cash, and the $1,100 transaction referred to occurred while he was so engaged. After this, however, he rented a mill, and was engaged in business as a miller when the words complained of were spoken. The petition did not sufficiently allege special damages, and so the only question in the case is, were the words actionable *per se*.

It is urged in support of the judgment that the vital fact that the words were spoken of the plaintiff as a miller is denied, and that, his own testimony showing he was simply running an exchange for appellee at the time the transaction referred to took place, the instruction was proper. The following authorities are relied on: "It is not enough for the plaintiff to prove his special character and that the words refer to himself. He must further prove that the words refer to himself in that special character, if they be not otherwise actionable. It is a question for the jury whether the words were spoken of the plaintiff in the way of his office, profession, or trade. It is by no means necessary that the defendant should expressly name the plaintiff's office or trade at the time he spoke if his words must necessarily affect the plaintiff's credit and reputation therein. But often words may be spoken of a professional man, which, though defamatory, in no way affect him in his profession, e.g., an imputation that an attorney has been whipped off the courts at Dancaster, or that a physician has committed adultery." Odgers on Libel and Slander, Star, p. 541; 18 Am. & Eng. Ency. of Law, 944. On the other hand, in the same works the law as to imputations upon traders or merchants is thus stated: "The law has special regard for the reputation of men, which they have acquired as merchants or traders, and as will be seen more particularly hereinafter, in considering the precise nature of actionable words concerning them, any words, whether oral or written which impute to merchants, traders, or other business men, insolvency, financial difficulty, or embarrassment, dishonesty, or fraud, or which in any other manner are prejudicial to them in the way of their employment or trade, are actionable *per se*." 18 Am. & Eng. Ency. of Law, p. 954. "In those trades or professions in which, ordinarily, credit is essential to their successful prosecution, there language is actionable *per se*, which imputes to any one in any trade or profession a want of credit, responsibility, or insolvency, past or present or future; as to say of a tradesman, 'He is not able to pay his debts' or, 'he owes more than he is worth; he will break shortly. He is a pitiful fellow, and a rogue; he compounded his debts at 5s. in the pound.'" Townshend on Slander and Libel, section 191.

In support of the texts a great number of cases are collected. There seems to be no conflict of authority on the subject. The reason for the rule is that where a man is engaged in trade his credit is the life of his business, and to destroy his credit is to ruin him. Taken as

a whole, the words used by appellee above quoted, were an imputation of present want of integrity on the part of the appellant in his business of a miller. The words were spoken to a customer, who had promised his wheat to appellant. They were evidently spoken to create in his mind the belief that he might suffer by keeping his promise, and to induce him to break it. They were spoken by a rival in business. If Dudderar credited what appellee said, he would necessarily believe appellant was as a miller not to be trusted. The words, "Well, you won't want to price it to him but once" imported a present condition rendering credit to him as a miller unsafe for one who extended it. It is true the condition is added, "If he beats you out of as much as he beat me out of"; but this only accentuated the imputation, for the following explanation was added: "He just beat me out of $1,100 in three months." The fair meaning of the whole, taken together, was an imputation that Dudderar would not sell his wheat to Fred but once, as he would then find out that he could not afford to. A miller buying grain and selling his products can not exist without the confidence of his customers. He must have credit, or his mill will be deserted of trade. The words charged were spoken of the plaintiff as a miller in relation to the business he was then carrying on, as a warning to a customer not to trade with him. They necessarily touch him as miller, and were actionable under the rule above quoted, as an imputation upon his credit and honesty.

Judgment reversed, and cause remanded for a new trial.

QUESTIONS

1. What was the issue involved in the principal case? How was the issue decided? What rule of law can be deduced from the decision?
2. The court said that the only question in the case was whether the words were *actionable per se*. What is meant by this statement?
3. What is meant by *special damages?* When must special damages be alleged and proved in order to establish an actionable defamation?
4. Did the court hold in the principal case that the plaintiff had to allege and prove special damages as a condition to a recovery? If not, why not?
5. Suppose that the defendant had said that the plaintiff drank excessively and frequently beat his wife, would the decision have been the same?
6. D falsely states to X that P, a doctor, is "no good, only a butcher and I would not have him for my dog." P sues D for damages but does not allege and prove special damages. What decision?
7. D publicly states that P, a merchant, is practically insolvent. P sues D but does not allege special damages. D demurs to the declaration. What decision?

8. D states to X that P, a retail grocer, habitually gives "short-weights" to his customers. P sues D but does not allege or prove special damages. What decision?
9. D publicly states that P, a merchant, "carries on his business in his sober moments." P sues D but does not allege or prove special damages. What decision?
10. D tells X that P, a clergyman, is hopelessly insolvent and cannot pay his debts. P sues D but does not allege or prove special damages. What decision?
11. D publicly states that P is a "returned convict." P sues D without alleging special damages. D demurs to the declaration. What decision?
12. D says to X: "P is a thief: he stole my land." P sues D without alleging or proving special damages. What decision?

THORLEY *v.* LORD KERRY

4 Taunton's Reports 355 (1812)

MANSFIELD, C. J. This is a writ of error brought to reverse a judgment of the Court of King's Bench in which there was no argument. It was an action on a libel published in a letter which the bearer of the letter happened to open. The declaration has certainly some curious recitals. It recites that the plaintiff was tenant of Archibald Lord Douglas of a messuage in Petersham, that being desirous to become a parishoner and to attend the vestry, he agreed to pay the taxes of the said house; that the plaintiff in error was church warden, and that the defendant in error gave him notice of his agreement with Lord Douglas, and that the plaintiff in error, intending to have it believed that the said earl was guilty of offences and misconducts thereinafter mentioned (offences there are none, misconduct there may be), wrote the letter to the said earl which is set forth in the pleadings. There is no doubt that this was libel, for which the plaintiff in error might have been indicted and punished; because though the words impute no punishable crimes, they contain that sort of imputation which is calculated to vilify a man, and bring him, as the books say, into hatred, contempt, and ridicule; for all words of that description an indictment lies; and I should have thought that the peace and good name of individuals was sufficiently guarded by the terror of this criminal proceeding in such cases. The words, if merely spoken, would not be of themselves sufficient to support an action. But the question now is, whether an action will lie for these words so written, notwithstanding that such an action would not lie

for them if spoken; and I am very sorry it was not discussed in the Court of King's Bench, that we might have had the opinion of all the twelve judges on the point, whether there may be any distinction as to the right of action, between written and parol scandal; for myself, after having heard it extremely well argued, and especially, in this case, by Mr. Barnewall, I cannot, upon principle, make any difference between words written and words spoken, as to the right which arise on them of bringing action. For the plaintiff in error it has been truly urged, that in the old books no distinction has been taken between words written and spoken. But the distinction has been made between written and spoken slander as far back as Charles the Second's time, and the difference has been recognized by the courts for at least a century back. It does not appear to me that the rights of parties to a good character are insufficiently defended by the criminal remedies which the law gives, and the law gives a very ample field for retribution by action for words spoken in the cases of special damages, or words spoken of a man in his trade or profession, of a man in office, of a magistrate or officer; for all these an action lies. But for mere general abuse spoken, no action lies. In the arguments of the judges and counsel, in almost all the cases in which the question has been, whether what is contained in writing is the subject of an action or not, it has been considered whether the words, if spoken, would maintain an action. It is curious that they have also adverted to the question, whether it tends to produce a breach of the peace; but that is wholly irrelevant, and is no ground for recovering damages. So it has been argued that writing shows more deliberate malignity; but the same answer suffices, that the action is not maintainable upon the ground of malignity, but for the damages sustained. So it is argued that written scandal is more generally diffused than words spoken, and is therefore actionable; but an assertion made in a public place, as upon the Royal Exchange, concerning a merchant in London, may be much more extensively diffused than a few printed pages dispersed, or a private letter; it is true that a newspaper may be very generally read, but that is all casual. These are the arguments which prevail on my mind to repudiate the distinction between written and spoken scandal; but that distinction has been established by some of the greatest names known to the law, Lord Hardwicke, Hale, I believe, Holt, C. J., and others. LORD HARDWICKE, C. J., especially has laid it down that an action for a libel may be brought on words written, when the words, if spoken, would not sustain it. Co. Dig.

tit. Libel, referring to the case in Fitzg. 122, 253, says, there is a distinction between written and spoken words in scandal, by his putting it down there as he does, as being the law, without making any query or doubt upon it, we are led to suppose that he was of the same opinion. I do not now recapitulate the cases, but we cannot, in opposition to them, venture to lay down at this day, that no action can be maintained for any words written, for which an action could not be maintained if they were spoken; upon these grounds we think the judgment of the Court of King's Bench must be affirmed. The purpose of this action is to recover a compensation for some damages supposed to be sustained by the plaintiff by reason of the libel. The tendency of the libel to provoke a breach of the peace, or the degree of malignity which actuates the writer, has nothing to do with the question. If the matter were for the first time to be decided at this day, I should have no hesitation in saying, that no action could be maintained for written scandal which could not be maintained for the words if they had been spoken.

Judgment affirmed.

QUESTIONS

1. What is meant by the statement in the principal case, "This is a writ of error"?
2. What action was brought in this case? With what offense was the defendant charged in this action? What are the essential elements of this offense?
3. The court said that these words would not have been actionable if they had been merely spoken. Why not? What difference should it make whether words, alleged to be actionable, are written or spoken?
4. What form must a communication take in order to constitute an actionable libel? Would it be a libel to print a defamatory picture of a person? To hang a person in effigy? To build a gallows before his home?
5. D writes a letter to X in which he says: "P is a hypocrite and uses the cloak of religion for unworthy purposes." P, who is a retired farmer, sues D but does not allege special damages. What decision?
6. D writes a letter to X in which he says: "P is an itchy old toad." P sues D but does not allege or prove special damages. What decision?
7. D writes a letter to X in which he states that P is a rascal. P sues D for libel but does not allege special damages. What decision?
8. P and D are rival undertakers in the town of X. D prints cards with this statement: "In case of death, remember that I am an efficient and up-to-date undertaker. (Signed) P." When death or serious illness

occurred in a family, D would send one of these cards to the home. What remedy, if any, has P against D?

9. In what cases must special damages be alleged and proved in order to establish actionable defamation?

10. What is the essence of special damages?

d) Security of Social and Economic Relations

LUMLEY *v.* GYE

2 Ellis and Blackburn's Reports 216 (1853)

ERLE, J. The question raised upon this demurrer is, whether an action will lie by the proprietor of a theatre against a person who maliciously procures an entire abandonment of a contract to perform exclusively at that theatre for a certain time; whereby damage was sustained? And it seems to me that it will. The authorities are numerous and uniform, that an action will lie by a master against a person who procures that a servant should unlawfully leave his service. The principle involved in these cases comprises the present; for, there the right of action in the master arises from the wrongful act of the defendant in procuring that the person hired should break his contract, by putting an end to the relation of employer and employed; and the present case is the same. If it is objected that this class of actions for procuring a breach of contract of hiring rests upon no principle, and ought not to be extended beyond the cases heretofore decided, and that, as those have related to contracts respecting trade, manufactures or household service, and not to performances at a theatre, therefore they are no authority for an action in respect to contracts for such performance; the answer appears to me to be, that the class of cases referred to rests upon the principle that the procurement of the violation of the right is a cause of action, and that, when this principle is applied to a violation of a right arising upon a contract of hiring, the nature of the service contracted for is immaterial. It is clear that the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong, as in violations of a right to property, whether real or personal, or to personal security: he who procures the wrong is a joint wrong-doer and may be sued, either alone or jointly with the agent, in the appropriate action for the wrong complained of. Where a right to the performance of a contract has been violated by a breach thereof, the remedy is upon the contract against the contracting party; and, if he is made to indemnify for such breach, no further recourse is

allowed; and, as in case of the procurement of a breach of contract the action is for a wrong and cannot be joined with the action on the contract and as the act itself is not likely to be of frequent occurrence nor easy of proof, therefore the action for this wrong, in respect of other contracts than those of hiring, are not numerous; but still they seem to be sufficient to show that the principle has been recognized. In *Winsmore* v. *Greenbank* it was decided that the procuring of a breach of the contract of a wife is a cause of action. The only distinction in principle between this case and other cases of contracts is, that the wife is not liable to be sued; but the judgment rests on no such grounds; the procuring a violation of the plaintiff's rights under the marriage contract is held to be an actionable wrong. In *Green* v. *Button* it was decided that the procuring of a breach of a contract of sale of goods by a false claim of lien is an actionable wrong. *Shepherd* v. *Wakeman* is to the same effect, where the defendant procured a breach of the contract of marriage by asserting that the woman was already married. In *Ashley* v. *Harrison* and in *Taylor* v. *Neri* it was properly decided that the action did not lie, because the battery, in the first case, and the libel, in the second case, upon the contracting parties were not shown to be with intent to cause those persons to break their contracts, and so the defendants by their wrongful acts did not procure the breaches of contract which were complained of. If they had so acted for the purpose of obtaining these breaches, it seems to me they would have been liable to the plaintiffs. To these decisions, founded on the principle now relied upon, the cases for procuring breaches of contracts of hiring should be added; at least Lord Mansfield's judgment in *Bird* v. *Randall* is to that effect. This principle is supported by good reason. He who maliciously procures a damage to another by violation of his right ought to be made to indemnify, and that whether he procures an actionable wrong or a breach of contract. He who procures the non-delivery of goods according to contract may inflict an injury, the same as he who procures the abstraction of goods after delivery; and both ought on the same ground to be made responsible. The remedy on the contract may be inadequate, as where the measures of damages is restricted; or in the case of non-payment of a debt where the damage may be bankruptcy to the creditor who is disappointed, but the measure of damages against the debtor is interest only; or in the case of non-delivery of the goods, the disappointment may lead to a heavy forfeiture under a contract to complete a work within a time, but the measure

of damages against the vendor of the goods for non-delivery may be only the difference between contract price and the market value of the goods in question at the time of the breach. In such cases, he who procures the damage maliciously might justly be made responsible beyond the liability of the contractor.

With respect to the objection that the contracting parties had not begun the performance of the contract, I do not think it a tenable ground of defense. The procurement of the breach of the contract may be equally injurious, whether the service had begun or not, and in my judgment ought to be equally actionable, as the relation of employer and employed is constituted by the contract alone and no act of service is necessary thereto.

The result is that there ought to be, in my opinion, judgment for the plaintiff.

QUESTIONS

1. What action was brought in the principal case? With what offense was the defendant charged in the action?
2. The defendant demurred to the plaintiff declaration. What was the effect of the demurrer?
3. In the principal case it was alleged that the defendant "maliciously" procured the breach of the contract. What does the court mean by "malice" in this connection?
4. Could the plaintiff have recovered damages from the singer for a breach of this contract? If so, why permit him to recover damages from the defendant?
5. X is under a contract to serve P for three months. D, in ignorance of this contract, induces X to accept employment with him. P sues D for damages. What decision?
6. D knows that X is employed by P, but does not know X is under contract for a definite period. P sues D for damages. What decision?
7. D, knowing that X is under a contract to work for P, assaults him, inflicting such severe injury that X is compelled to break his contract with P. P sues D for damages. What decision?
8. P had a contract to sell wheat to X. D falsely stated that he had a lien on the wheat. X broke his contract with P because of this claim. P sues D for damages. What decision?
9. X was under a contract to sell cheese to P. D, desiring to secure the cheese in question, sent a telegram with P's name forged to it, stating that P did not want the goods in question. Thereupon X sold and delivered the cheese to D. P sues D for damages. What decision?

10. X was under a contract to work for P. D by threats of force and violence compelled X to break his contract with P. P sues D for damages. What decision?
11. X is under a contract to sell goods to P. The agreement is not enforcible because not in writing as required by the Statute of Frauds. D by fraud induces X to break the contract with P. P sues D for damages. What decision?
12. P has a contract with I, an infant. D by defamatory statements concerning P induces I to break his contract. P sues D for damages. D contends that he is not liable because an infant is not bound by his promises. What decision?
13. X is under a contract of employment with P. D, needing additional employees, induces X by a promise of higher wages to leave P and accept employment with him. P sues D for damages. What decision?

3. Fixing Responsibility for Invasion of Protected Interests

a) The Existence of a Voluntary Act

LAIDLAW *v.* SAGE

158 New York Reports 73 (1899)

Appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department affirming a judgment in favor of plaintiff, entered upon the verdict of a jury, and from an order affirming an order denying the defendant's motion for a new trial.

The judgment of affirmance was entered March 12, 1896, and contained no provision showing that the Appellate Division was unanimous in awarding it. Subsequent to its entry, the plaintiff moved for a resettlement of the order of affirmance so that it should appear in the order that the decision of the court was unanimous, but that motion was denied.

MARTIN, J. This action was commenced May 26, 1892. Its purpose was to recover for personal injuries sustained by the plaintiff in consequence of an explosion which occurred in the defendant's office in the city of New York on the 4th day of December, 1891.

The evidence disclosed that a stranger, whose name was subsequently found to be Norcross called at the defendant's office December 4, 1891, at about ten minutes past twelve o'clock, said he desired to see the defendant in relation to some railroad bonds and had a

letter of introduction from Mr. Rockefeller. When asked to send it to the defendant, he stated that he preferred to present it in person, and that he only wanted to say two or three words. Upon receiving this message, the defendant stepped from his private office into the anteroom, went to the window and looked into the lobby, where he saw Norcross sitting upon a settee. At that time the defendant met the plaintiff, who said he had a message from Mr. Bloodgood, and the defendant thereupon turned the knob of the door and the plaintiff passed into the anteroom of the office. The former then spoke to Norcross, who instantly arose, took his carpet bag in his left hand, and approaching him, handed him a letter which was supposed to be from Mr. Rockefeller, which he took, opened and read. It was a typewritten communication, the substance of which was: "The bag in my hand holds ten pounds of dynamite. If I drop this bag on the floor, the dynamite will explode and destroy this building in ruins, and kill every human being in the building. I demand $200,000, or I will drop the bag. Will you give it? Yes or no?"

The defendant read the letter twice, folded it, handed it back to Norcross, and then commenced parleying with him, stating that he had an engagement with two gentlemen, that he was short of time, and if it was going to take much time he wanted him to come later in the day. Norcross, after a second, said: "Then, do I understand you to refuse my offer?" To which the defendant replied: "Oh, no, I don't refuse your offer. I have an appointment with two gentlemen. I think I can get through with them in about two minutes, and then I will see you."

Norcross held the bag at the end of his fingers, walked backwards toward the door—through which he came, and when he reached the threshold, he stopped and looked at the defendant. The defendant stepped back a little toward the desk that was in the anteroom, while Norcross was going the other way. As he reached the threshold, he looked at the defendant and said: "I rather infer from your answer that you refuse my offer," to which the defendant answered: "Is there anything in my appearance that would cause you to think that I would not do as I say I would?" and repeated that he had an appointment with two gentlemen, and that he could get through in about two minutes; and would then see him. Norcross, then gave one look, stepped to one side, when the flash came, and it was all over in two seconds. In backing down the room, the defendant

came to the desk, and was partially sitting upon the edge of it when the explosion occurred.

After the explosion it was found that everything in the office was wrecked. The partitions, floors, joists, plaster, chairs, desk and other furniture were destroyed, the window sashes and window frames were blown out, even in the private office; Norcross was blown to pieces, and Norton, one of the clerks, in the defendant's office, was hurled through the window to the street below, where he met his death. A steel safe which was locked and stood in an adjoining room was blown open, its contents scattered upon the floor with other débris, and every person who was in the room was either killed or seriously injured. Indeed the explosion was so violent, so general, and so destructive in its effects that it seems little less than a miracle that any person who was present should have escaped with his life. This portion of the transaction is undisputed in any essential or material particular.

The plaintiff claims that upon entering the office he passed the defendant and Norcross, who were conversing in the lobby near the door of the anteroom; that he entered the anteroom which was about eight by sixteen feet, went to a table or desk near the center of the room, where he stood waiting for the defendant with his back to the door, looking toward Mr. Norton, who stood by the ticker at the window looking out on Rector Street; that while he stood there, he once or twice glanced over his shoulder, saw the defendant was inside the anteroom and that Norcross was just outside; that he heard nothing said, said nothing himself, and saw no paper in the defendant's hand; that he turned and looked toward the window with his back to the defendant, when the latter suddenly came in range of his vision on his left side—came over and placed his hand on his shoulder, that afterwards he dropped his left hand and took the plaintiff's right hand in his and gently moved him toward the direction in which he stood which was from the plaintiff's right to his left, and that he gently moved him about the width of his body, about fifteen inches, or probably more. He then testified: "I changed my position toward Mr. Sage about fifteen inches. I changed my position in his general direction, but in front of us. I still kept my position as far as Rector Street was concerned and the door of the entry. I had my back to the door all the time. I was in a line between Mr. Sage and Mr. Norcross. Mr. Sage rested one thigh on the corner

of this table, and then said over his shoulder to this stranger, 'If I trust you why cannot you trust me?, or if you cannot trust me I cannot trust you', or words in that general line, and to that effect and then the explosion immediately followed."

The primary question which lies at the foundation of the respondent's right of recover is whether there was sufficient evidence to justify the court in refusing to direct a verdict for the defendant, or in submitting to the jury the question of the defendant's liability. This general question seems to depend for its solution upon several subordinate ones. These questions are, *first*, was there sufficient evidence that the defendant performed any act or was guilty of any omission which rendered him even technically liable to the plaintiff.

First. That at the time of the occurrence which was the subject of this action, the defendant suddenly and unexpectedly found himself confronted by a terrible and impending danger which would naturally, if not necessarily, terrify and appal the most intrepid, is shown by the undisputed evidence. If, with this awful peril before him, he maintained any great degree of self-control, it indicated a strength of nerve and personal bravery quite rare indeed.

That the duties and responsibilities of a person confronted with such danger are different and unlike those which follow his actions in performing the ordinary duties of life under other conditions is a well established principle of law. The rule applicable to such a condition is stated in Moak's *Underhill on Torts* (p. 14) as follows: "The law presumes that an act or omission done or neglected under the influence of pressing danger, was done or neglected involuntarily." It is there said that this rule seems to be founded upon the maxim that self-preservation is the first law of nature and that where it is a question of whether one of two men shall suffer, each is justified in doing the best he can for himself. This principle of pressing danger and an act of omission in its presence was discussed in the squib case (*Scott* v. *Shepherd*, 2 W. Black. 894) and in the wine case (*Vanderburg* v. *Truax*, 4 Denio, 464). That principle has been many times affirmed by the decisions of the courts of this state as well as others. Indeed, the trial court recognized this doctrine in its charge, but submitted to the jury the question whether the act of the defendant was involuntary and induced by impending danger, adding that the testimony of the defendant that everything he did he did voluntarily was sufficient to justify it in finding that he voluntarily moved the plaintiff in the manner claimed by him. But when we examined the

defendant's evidence, we find he testified that he never had his hands on the person of the plaintiff in any manner whatever until after the explosion and that he did not at any time have intent or design of interposing the body of the plaintiff between himself and the stranger. The testimony of the defendant to which the court referred in its charge seems to have been substantially that he was cool and collected as any man could well be *with the intimation* made by Norcross; that he exercised his best judgment *under the circumstances*. This evidence seems to fall short of justifying the statement of the court that he testified he was in perfect possession of his senses, recollected everything that was done, and that everything he did there was intentional as it very materially differed from and essentially modified the statement contained in the charge. The statement of the court as to the admission of the defendant can hardly be said to be a fair deduction from his evidence. Nor is the justice of eliminating from its statement to the jury the fact that the admission he did make was accompanied by evidence that he in no way touched the plaintiff, and had no intention of doing so, quite appreciated. If the court desired to use the admission of the defendant, as evidence of such a fact, the evidence should have been correctly stated and the attention of the jury called to the entire admission and not a part alone. Here as where there is an introduction of any other conversation or admission by a party, the remainder which tends to qualify or explain the portion relied upon should be considered as a part of it, especially where it is a qualification of the other and rebuts or destroys the inference to be drawn or the use to be made of the portion put in evidence or relied upon. While it is doubtless true that a portion of the testimony of a witness may be credited by a jury and a portion discredited, still when a part of the evidence is modified or qualified by another portion, it is far from clear that one portion may be rejected and the other given credit. But be that as it may, it is extremely difficult upon a consideration of all the evidence in the record relating to this subject, to see how a jury was justified in finding that the defendant voluntarily interfered with the person of the plaintiff.

Reversed.

QUESTIONS

1. What was the issue under consideration in the principal case? How was this issue decided? What rule of law can be deduced from the decision?

2. Assume that the defendant did put his hands on the plaintiff and shield himself behind P, would P be entitled to recover damages for the injury he sustained?
3. D sees a man drowning. D takes no steps to save his life. The personal representative of the deceased sues D for damages. What decision?
4. In the foregoing case, D swims out, seizes the man and starts to the shore with him, when he discovers that it is X, whom he thoroughly dislikes. He releases X and the latter drowns. P, the personal representative of X, brings an action against D for damages. What decision?
5. An engine of the D Company accidentally ran over and severely injured X. The servants of D Company could have saved his life by the exercise of slight effort; but they did not exert the effort and X died. X's personal representative sued D for damages. What decision?
6. D's horse ran away with him and threw him on P's land. P sued D for damages in trespass. What decision?

b) The Act as a Cause of the Result Complained of

LAIDLAW *v.* SAGE

158 New York Reports 73 (1899)

MARTIN, J. Was there sufficient evidence to justify the court in submitting to the jury the question of substantial damages? If, for the purpose of this discussion, it be admitted that the plaintiff was moved as testified to by him, and that the act of the defendant was voluntary and intentional, yet we are unable to find any sufficient evidence in the record to justify the court in submitting to the jury the question whether the plaintiff's injuries arose in consequence of the act of the defendant in moving him. The court in effect charged the jury that if the defendant interfered with the body of the plaintiff and the injuries inflicted because of a change in his position, then, it might allow the plaintiff for the injuries which he sustained in consequence of the wounds which it found were caused by his change of position, and the jury was permitted to pass upon the question whether he sustained more or different injuries than he would if he had not been moved. The contention of the respondent is that the evidence disclosed that there were two straight and well-defined lines of explosion, and that it tended to show that the plaintiff was drawn into one of them. But we found no proof either that the lines

of explosion claimed did not include the place where the plaintiff originally stood, or that a wave of explosion did not pass over that portion of the room which was as forceful and destructive as that passing in any other direction.

The evidence relied upon by the plaintiff to show that there were these two defined lines was the location of the wounds upon the body of the plaintiff and the testimony of the witness Reeves. When we examine the evidence bearing upon the character and location of the plaintiff's wounds, it falls far short of establishing any well defined line of explosion. Nor do we think any such inference can be drawn from the situation as described by the plaintiff and other witnesses. And when we examine the evidence of the witness Reeves, we find in it nothing to sustain the contention of the plaintiff. He testified that there were thirty-five to forty joists or beams which ran north and south that were injured, and that the breakage ran through the joists in a northeasterly direction. He was then asked whether there were fractures in any other direction in the beams or joists from that hole, to which he answered that he had put in new beams on the Rector Street side of the partition leading into Mr. Sage's office; that he put in about twenty-eight or thirty new ones, and that the balance were not so badly fractured, so that they were reinforced without taking the old beams out. We find nothing in this evidence to indicate that there was any distinct line of explosion in any other direction than northeasterly. That the splitting of the joists, if it occurred, would naturally extend lengthwise of them there can be little doubt. But the plaintiff's claim that there is anything in this evidence which shows a second distinct line of explosion within which he was drawn, even if he was moved, as he testified, surely cannot be sustained. Consequently, there was nothing but the merest conjecture upon which the jury could base any finding that he was more severely injured by being moved. That he was bound to establish some wrongful act upon the part of the defendant, and that that act was the cause of the injury for which he sought to recover, there can be no doubt. Nor is there any doubt that the burden of proof upon both of those questions rested upon him. The courts below have so held, but, notwithstanding their view of the law, they have submitted those questions to the jury.

It is impossible to consider the plaintiff's injuries without a feeling of profound sympathy. His misfortune was a severe one, but sympathy, although one of the noblest sentiments of our nature,

which brings its reward to both the subject and actor, has no proper place in the administration of the law. It is properly based upon moral or charitable considerations alone, and neither courts nor juries are justified in yielding to its influence in the discharge of their important and responsible duties. If permitted to make it the bases of transferring the property of one party to another, great injustice would be done, the foundation of the law disturbed and anarchy result. Hence every proper consideration requires us to disregard our sympathy and decide the questions of law presented according to the well-established rules governing them.

The judgments of the Appellate Division and of the trial courts should be reversed and a new trial granted, with costs to abide the event.

QUESTIONS

1. What was the problem under discussion in this portion of the case of *Laidlaw* v. *Sage?* Compare it with the problem which the court discussed in that portion of the decision reprinted above on page 181.
2. Assume that the defendant did voluntarily shield himself behind the plaintiff, what more must the plaintiff prove to establish an actionable wrong?
3. X, a flagman, was sent back at night to signal an approaching train. The engine was without a headlight. He saw it coming and, in trying to get off the track, negligently stumbled and was struck by the engine before he could recover. X's personal representative sues the company for damages, contending that it was negligent for the defendant to run an engine without a headlight. What decision?
4. P was contemplating the purchase of a horse from D. D represented that the horse was sound in all respects, with knowledge that his statement was false. P paid $400 for the horse, knowing that it was blind in one eye. He brought an action against D in deceit, alleging that the horse was worth only $200 and that he had suffered damages to the extent of $200. What decision?
5. "Philosophically speaking, the sum of all the antecedents of any event constitutes its cause." What is meant by this statement?
6. Should a person be held legally responsible for everything he physically causes?

c) *The Act as a Responsible Cause of the Result Complained of*

A person is not compelled by our law to compensate others for injuries in the causation of which he had no part. But is a person to be made to answer for all the consequences of which he is one of the "indispensable antecedents?" If physical causation were regarded

as the test of a person's liability for injuries sustained by others, a severe handicap would be placed upon the individual and upon individual activities. Persons would naturally be reluctant to act for fear of incurring responsibility for remote and unforeseeable consequences. Such a basis of liability would be highly unwise in a society in which so much emphasis is placed upon the individual and upon individual activities.

On the other hand, the law cannot well afford to grant immunity to individuals from all the consequences of which they are physically the cause. Physical causation, as a basis of liability, would unduly restrict social activities; complete immunity from all consequences of one's acts would place too high a premium on wastefulness and destruction of social energies. Between these two extremes some compromise must be made.

In making the compromise between the two extremes, the law must predicate bases of liability. It must formulate standards for determining whether the actor is to be held legally responsible for the consequences of his acts or whether the loss must be borne by the person upon whom it falls in the first instance.

If a person intentionally causes damage to one of the interests which society deems worthy of protection, is there any good reason for granting him immunity from the results of his act? Perhaps this question can be answered only in the light of a proper understanding of what is meant by an intentional act. "Intention is the purpose or design with which an act is done. It is the foreknowledge of the act, coupled with the desire of it, such foreknowledge and desire being the cause of the act in as much as they fulfill themselves through the operation of the will. An act is intentional if, and in so far, as it exists in fact, the idea realizing itself in the fact because of the desire by which it is accompanied."[1] In short, an act and all its consequences are intentional when the actor conceives of the act, foresees its consequences, and desires and strives to bring them to pass in the external world.

One who causes an injurious result to a protected interest in this state of mind is entitled to no sympathy or consideration from law or society. Augmentation of social activities in such a manner would be purchased at too dear a price. In the long run, it would mean waste and destruction of social values and social energy. More than this, it would mean a destruction of our present social organization

[1] Salmond, *Jurisprudence* (5th ed.), 335.

and chaos would reign in place of order. For these reasons, the law wisely says that those who intentionally cause damage to the protected interests of other persons must indemnify them for the loss so caused.

QUESTIONS

1. What is the difference between an intentional act, a negligent act, and a non-negligent act?
2. D throws a rock, foreseeing that it will fall in a crowded street, but hoping that it will not hit anyone. It strikes P in falling. Is the striking of P intentional, negligent, or accidental?
3. D walks on P's land, honestly thinking that it is his own. P sues D for damages. What decision?
4. D shoots at P, foreseeing and desiring that he may hit him. Because of the distance intervening and because of his poor marksmanship, he really does not expect to hit him. He does hit him. Is the shooting of P intentional, negligent, or accidental?
5. D is operating a large factory and from past experience knows that a certain number of his employees will be injured every year. But notwithstanding this knowledge, he continues to operate the factory. Is D guilty of intentionally injuring his employees?
6. D severely assaults P, honestly believing that P is X against whom he entertains a time-honored grudge. P sues D for an assault and battery. What decision?
7. D publishes a statement that Henry H. Brown swindled him in a stock transaction. The statement is true concerning one Henry H. Brown, who is obscurely known. It is not true concerning Henry H. Brown, who is well known in the city in which the statement was published. A majority of the people believe that the statement was intended to refer to the second Henry Brown. He sues D for damages. What decision?
8. D intending to deceive X told him that a certain piece of land which he owns and wishes to sell cost him $5,000. P overheard the statement and later bought the land for $6,000 in reliance on it. P sues D in deceit, alleging that the land cost D only $3,500. What decision?
9. Assuming that a person does intentionally injure another, what justification is there for holding him responsible for the damages caused?

VAUGHAN *v.* MENLOVE

3 Bingham's New Cases 468 (1837)

This was an action by the plaintiff for the loss of his cottage alleged to have been caused by the defendant. At the trial it appeared that the defendant had constructed a hay rick near the boundary

of his own premises; that the hay was in such a state when put together as to give discussion on the probability of fire; that though there were conflicting opinions on the subject yet during a period of five weeks the defendant was repeatedly warned of his peril; that his stock was insured; and that upon one occasion being advised to take the rick down to avoid danger, he said "he would chance it." He made an aperture or chimney through the rick, but in spite, or perhaps, in consequences of this precaution; the rick at length burst into flames from the spontaneous heating of its materials; the flames were communicated to the defendant's barn and stables and thence to the plaintiff's cottages which were entirely destroyed. The plaintiff had verdict in the court below. The defendant obtained a rule for a new trial.

TINDAL, C. J. I agree that this is a case *primae impressionis;* but I feel no difficulty in applying to it the principles as laid down in other cases of similar kind. Undoubtedly this is not a case of contract, such as a bailment or the like where the bailee is responsible in consequence of the remuneration he is to receive; but there is a rule of law which says that you must so enjoy your own property as not to injure that of another; and according to that rule the defendant is liable for the consequences of his own neglect; and though the defendant himself did not light the fire, yet mediately he is as much the cause of it as if he had himself put a candle to the rick; for it is well known that hay will ferment and take fire if it be not carefully stacked. It has been decided that if an occupier burns weeds so near the boundary of his own land that damage ensues to the property of his neighbor, he is liable to an action for the amount of injury done, unless the action were occasioned by a sudden blast which he could not foresee. *Tuberville* v. *Stamp*. But the case of a chemist making experiments with ingredients, singly innocent, but when combined, liable to ignite; if he leaves them together, and injury is thereby occasioned to the property of his neighbor, can any one doubt that an action on the case would lie?

It is contended however that the learned Judge was wrong in leaving this to the jury as a case of gross negligence, and that the question of negligence was so mixed up with reference to what would be the conduct of a man of ordinary prudence that the jury might have thought the latter the rule by which they were to decide; that such a rule would be too uncertain to act upon; and that the question ought to have been whether the defendant had acted *honestly* and

bona fide to the best of his own judgment. That however would leave so vague a line as to afford no rule at all, the degree of judgment belonging to each individual being infinitely various; and though it has been urged that the care which a prudent man would take, is not an intelligible proposition as a rule of law, yet such has always been the rule adopted in cases of bailment, as laid down in *Coggs* v. *Bernard*. Though in some cases a greater degree of care is exacted than in others, yet in "the second sort of bailment, viz., *commodatum* or lending *gratis* the borrower is bound to the strictest care and diligence to keep the goods so as to restore them back again to the lender; because the bailee has a benefit by the use of them, so as if the bailee be guilty of the least neglect, he will be answerable; and as if a man should lend another a horse to go westward for a month; if the bailee put this horse in his stable and he were stolen from thence, the bailee shall not be answerable for him, but if he or his servant leave the house, or stable doors open, and the thieves take the opportunity of that and steal the horse, he will be chargeable because the neglect gave the thieves the occasion to steal the horse." The care taken by a prudent man has always been the rule laid down; and as to the supposed difficulty of applying it, a jury has always been able to say, whether taking that rule as their guide there has been negligence on the occasion in question.

Instead therefore of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe. That was in substance the criterion presented to the jury in this case and therefore the present rule must be discharged.

QUESTIONS

1. What was the issue in the principal case? How was it decided? What rule of law can be deduced from the decision?
2. Did the defendant cause the result complained of in this case? Did the court hold him responsible for it? Should a person be held legally responsible for everything he causes?
3. Did the defendant honestly believe that there was no danger from spontaneous combustion? Suppose that the defendant had honestly but unreasonably believed that there was no danger from spontaneous combustion, would the decision of the court have been the same?

4. Suppose that all the people in the community had believed as the defendant did, except one man who had made an expert study of such matters, would the decision have been the same?
5. Why say that a man must use the caution or care of a man of ordinary prudence not to injure another? Why not say that the liability for negligence should be co-extensive with the judgment of each individual? Or why not say that a person must do his utmost under all circumstances not to injure another person?
6. What test did the court lay down in the principal case for determining whether a given act is negligent or otherwise?
7. P lent a team of horses to D. One of the horses became sick. D, not professing to have any skill as a veterinary surgeon, gave the horse some medicine which killed it. P sues D for damages. What decision?
8. D rides B's horse on slippery ground. The horse fell and was injured. P sues D for damages. What decision?
9. Suppose in the foregoing case that D possessed special skill in riding and handling horses, would the possession of such skill render him liable when he would not have been if he had not possessed the special skill?

SMITH *v.* LONDON RAILWAY COMPANY

Exchequer Reports 6 Common Pleas Cases 14 (1870)

Appeal from a decision of the Court of Common Pleas, discharging a rule to enter a verdict for the defendants of a nonsuit.

KELLY, C. B. I certainly entertained some doubts during the argument as to whether the judgment of the Court below could be sustained; but when I consider the facts, I cannot but feel that it is a case in which there was some evidence of negligence on the part of the defendants, and negligence which caused the injury complained of. It appears that about the time that the spot in question was passed by an engine which, as we know, would emit sparks which would fall on the adjoining ground, a fire was discovered on the defendant's ground adjoining the line. It appears that it had been a dry summer and the hot weather had continued for many weeks before the occurrence; and probably with a view to prevent mischief the defendants had caused the grass that grew by the line and the fence to be cut, and the cuttings of the grass and the hedge were placed in small heaps on the ground between the rails and the hedge. On the other side of the hedge was a stubble field of considerable extent which would be extremely dry, and at a distance of two hundred yards across a road was the cottage belonging to the plaintiff.

This was the state of the facts. The trimmings caught fire, there was strong south wind blowing; and though we have no proof of the exact progress of the fire, because the company's servants who had seen it were not called, it appears to have extended to and through the hedge and across the field to the plaintiff's cottage which was burnt. The question for us is, how all this occurred. There is some doubt how the fire originated, but there was ample evidence for the jury, which would have been rightly left to them, that it originated from sparks from the engine falling on dry heaps of trimmings, and these extended to the hedge and stubble field. If that was so, the question arises whether there was any negligence in the defendants. Now it can scarcely be doubted that the defendants were bound in such a summer, knowing that trains were passing from which sparks might fall upon them, to remove these heaps of trimmings; and at any rate it was a question for the jury whether it was not negligent of them not to do so. I think, therefore, there was a case for the jury on which they might have reasonably found that the defendants were negligent in not removing the trimmings as soon as possible, and that this was the cause of the injury.

Then comes the question raised by BRETT, J., to which at first I was inclined to give some weight. He puts it thus: "I quite agree that the defendants ought to have anticipated that sparks might be emitted from their engines, notwithstanding that they were of the best construction and were worked without negligence and that they might reasonably have anticipated that the rummage and hedge trimmings allowed to accumulate might be thereby set on fire. But I am of opinion that no reasonable man would have foreseen that the fire would consume the hedge and pass over a stubble field, and so get to the plaintiff's cottage, a distance of about 200 yards from the railway—crossing a road in its passage." It is because I thought and still think the proposition is true that any reasonable man might well have failed to anticipate such a concurrence of circumstances as is here described that I felt pressed at first by this view of the question; but on consideration I do not feel that it is true test of the liability of the defendants in this case. It may be that they did not anticipate and were not bound to anticipate, that the plaintiff's cottage would be burned as a result of their negligence; but I think the law is, that if they were aware that these heaps were lying by the side of the rails, and that it was a hot season, and therefore by being left there, the heaps were likely to catch on fire, the

defendants were bound to provide against all circumstances which might result from this, and were responsible for all the natural consequences of it. I think, then, there was negligence in the defendants in not removing these trimmings, and that they became responsible for all the consequences of their conduct and that the mere fact of the distance of this cottage from the point where the fire broke out, does not affect their liability, and that the judgment of the Court must be affirmed.

QUESTIONS

1. Were the defendants the physical cause of the result complained of in the principal case? Is physical causation the test of liability in such cases? If not, what more must be shown?
2. What test did the court lay down for determining the liability of the defendants? Apply this test to the facts of the case.
3. Was the damage complained of reasonably foreseeable from the standpoint of the defendants? If not, why should they be held responsible for it?
4. Suppose that P had been asleep in the field adjoining the right of way and had been injured by the fire, would the defendants have been liable to him in damages?
5. D negligently ran a tug into a line of piles. The shock was transmitted to a pile quite a distance away, where P was working. The shock threw him from the pile on which he was working and the fall severely injured him. What decision in an action by P against the defendants?
6. Would the result complained of in the principal case have happened had not a strong south wind been blowing? Should not the intervention of this natural force relieve the defendants of their responsibility for the damage done?
7. D's vessel struck a shoal and lost its rudder because of the inattention of its crew. A strong wind and the tide drove it against P's sea wall and damaged it. P sues D for damages. What decision?
8. P delivered goods to the D Company for shipment from X to Z. The carrier without excuse delayed shipment three days. While at Y the goods were destroyed by a flood. Had they been shipped on time they would not have been destroyed. P sues D for damages. What decision?

MANZONI *v.* DOUGLAS

6 Queen's Bench Division Reports 145 (1880)

DENMAN, J. I am of opinion that the nonsuit in this case was right. I will first deal with the question whether *Hammack* v. *White*, is still to be considered law. I think it is. The cases of *Mitchil* v. *Alestree* and *Christie* v. *Griggs* are inapplicable. In the former the

decision turned upon the knowledge of the rider that the horse was of a wild nature and one which it was improper to exercise, for the purpose of taming him, in a public thoroughfare; and in the latter it turned upon the duty of the proprietor of a public vehicle to provide one which was reasonably safe for the purpose. The subsequent cases in which *Hammack* v. *White* has been cited do not in any one instance show that the case is not still good law. No single judge has intimated any dissatisfaction with the decision; but all have rather approved it. With the exception of *Simson* v. *London General Omnibus Co.*, none of these cases deal with the misconduct of inanimate creature, but all were cases of accidents arising from the mismanagement of an inanimate thing—a cask or a bale of goods, or insufficient tackle. The passage in the judgment in *Scott* v. *London Dock Co.*, "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant, or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care"—was applied to a bale of goods slung from a crane overhanging a public thoroughfare falling through some unexplained cause and injuring a passerby. Now, the two things—a bale of goods falling and a horse bolting—are so totally different in their nature that I think it would be a strong thing to hold that the principle there enunicated was intended to apply to the case of a horse. It is impossible to say that horses do not sometimes bolt without any negligence or unskilfulness of those having the charge of them. Here the evidence was, that the horse started off and became uncontrollable; and no question was put to either of the witnesses as to negligence on the part of the driver.

This is the case of a private person having a horse which suddenly bolts without, as I read the evidence, any negligence on the part of the driver. That is extremely like the case of *Hammack* v. *White*, which, if still law, fully warrants us in holding that the county judge was right in nonsuiting the plaintiff. The statement of claim is that a horse driven by a servant of the plaintiff was so negligently driven that he knocked down and injured the plaintiff. The evidence was this: the plaintiff was walking on the foot-pavement in Cockspur Street, and was knocked down by the defendant's horse and injured. In answer to a question put to the plaintiff on his cross-examination he said that he did not hear any one call out. A witness who saw the

accident stated that "the coachman was trying his hardest to stop the horse, and he was not able to do so." At this stage of the trial the plaintiff's counsel proposed to call witnesses to show that the horse's shoes were insufficient or that they were insufficiently fastened. But the defendant's counsel objected that this would not constitute "negligent driving," which was all that was charged in the statement of claim. The point, however, ultimately came to nothing; for, the next witness, who saw the horse bolt, stated that the first shoe was cast about twenty yards after the bolt. This witness also proved that the coachman was doing all he could to stop the horse, but that he had no control over it. Looking at the whole of the evidence and at the course taken at the trial, I think there was no prima facie evidence of negligence on the part of the defendant's coachman which ought to have been left to the jury. It was said that the driver was guilty of negligence, because he did not call out. The words "without warning," in the statement of claim were not inserted as a substantive allegation of negligence. Besides, there was no evidence we could rely on as to that, or that the omission to call out was the cause of the accident. All that appears upon the subject is the plaintiff's statement on cross-examination that he did not hear it. The whole thing would necessarily take place in a moment; and there could be no inference of negligence from the absence of warning. The nonsuit was right, and this rule must be discharged.

QUESTIONS

1. What is meant by a nonsuit? What is the effect of a nonsuit? The plaintiff was nonsuited in the principal case. Why?
2. What was the question before the court for determination in the principal case? How was it decided? What rule of law can be deduced from the decision?
3. Who determines the question whether the defendant is to be held responsible for damages of which he is an antecedent cause?
4. D has caused P physical damage. All reasonable men think that D's conduct was negligent. What is the duty of the court under such circumstances?
5. D sells gunpowder to P, a child of eight years. He turns the powder over to his mother, who gives him a part of it to play with. Later, he takes more with his mother's knowledge. An explosion occurs and seriously injures P. In an action for P against D for damages, the court leaves it to the jury to say whether D's act was negligent as to P. Was this correct?

6. P sues D for damages. He proves that while passing D's warehouse he was struck and injured by several falling bags. This is the only evidence which P offers to the jury. D thereupon asks that P be nonsuited. What decision?
7. The D Water Company laid its pipes and mains as required by law. For twenty-five years the apparatus of the company gave no trouble. An unprecedented frost occurred, the valves became incrusted with ice and failed to work. As a result water escaped and ran onto P's premises, doing a considerable amount of damage. P sues D for damages and alleges the foregoing facts. D asks for a nonsuit. What decision?
8. D bought a horse and was trying him out in a public street. Suddenly the horse became unmanageable, dashed from the roadway to the pavement, struck and killed P's intestate. P sues D for damages, alleging the foregoing facts. D asks for a nonsuit. What decision?

GILMAN *v.* NOYES

57 New Hampshire Reports 627 (1876)

CASE, for carelessly leaving the plaintiff's bars down, whereby his cattle and sheep escaped, and he was compelled to expend, and did expend time and money in hunting for the same, and his sheep were wholly lost.

The evidence tended to show that the defendant, in looking after his own cattle, left the plaintiff's bars down, and that his cattle, and three sheep belonging to one Marshall, and which the plaintiff was pasturing, were wholly lost. The defendant denied that said cattle and sheep escaped through the bars, and introduced evidence to show that they escaped through another fence of the plaintiff, and without fault on the part of the defendant.

The court instructed the jury, among other things, that if the defendant left the plaintiff's bars down, and his cattle thereby escaped, he was entitled to recover for the time and money expended in hunting for them; that if the sheep were in his possession and care, and they escaped in consequence of the bars being left down by the defendant, and would not have been killed but for the act of the defendant, he was liable for their value, whether the plaintiff was the absolute owner or not; that the statements made by the defendant were proper to be considered by the jury upon the question whether or not the damages to the plaintiff were occasioned by the acts of the defendant. To all of which refusals and instructions the defendant excepted.

The jury returned a verdict for the plaintiff, and assessed the damages for hunting for the cattle at $13.16, and for the sheep

at $9.00. The defendant moved to set the verdict aside, and for a new trial.

SMITH, J. I concur in the foregoing conclusion of the chief-justice, and for the reasons given by him. The principal question in this case has been much discussed in the English and American courts, though but little in this state. The rule, that the plaintiff can recover only when the defendant's act or negligence was the proximate cause of the injury, is one of universal application; but the difficulty lies in determining when the cause is proximate and when remote. It is a mixed question of law and of fact, to be submitted to the jury under proper instructions. We have recently held that it is always for the jury to say whether the damage sustained is what the defendant ought to have expected, in the exercise of reasonable care and discretion.

In this case the evidence tended to show the intervention of a new cause of the destruction of the plaintiff's sheep after their escape from his pasture, which could not reasonably have been anticipated. The only practicable rule to be drawn from all the cases, for determining this case, it seems to me, is, to inquire whether the loss of the plaintiff's sheep by bears was an event which might reasonably have been anticipated from the defendant's act in leaving his bars down, under all the circumstances of this case. If it was a natural consequence, which any reasonable person could have anticipated, then the defendant's act was the proximate cause. If, on the other hand, the bears were a new agency, which could not reasonably have been anticipated, the loss of the sheep must be set down as a remote consequence, for which the defendant is not responsible.

The jury were instructed that if the sheep escaped in consequence of the bars being left down by the defendant, and would not have been killed but for this act of the defendant, he was liable. Under these instructions the jury could not inquire whether the destruction of the sheep by the bears was an event which might reasonably have been anticipated from the leaving of the bars down, and for this reason I agree that the verdict must be set aside.

QUESTIONS

1. What instruction did the trial court give to the jury? What was the error in this instruction? What instruction should have been given?
2. What test did the court above lay down for determining the liability of the defendant? Apply this test to the facts of the case.

3. If the cattle had wandered away and had been stolen, would the decision in this case have been the same?
4. If the cattle after escaping from the pasture had been struck by lightning, would the decision have been the same?
5. D, a town, negligently permitted a pit to remain open near a sidewalk. P, a constable, was conducting a prisoner along that way. The prisoner pushed P into the pit and escaped. P sues D for damages. What decision?
6. D writes a letter to X, containing a defamation on P. X repeats the contents of the letter to Y, who proclaims it publicly. P sues D for libel. What decision? What is the measure of his damages?
7. D mounts a pile of flagstones belonging to P to make a political speech. A crowd gathers to listen. Several members of the crowd mount another pile of flagstones. Their combined weight breaks several stones. P sues D for damages. What decision?
8. D descended in a balloon into P's garden. His perilous position attracted a large number of people who climbed over into P's garden and trampled down his vegetables and flowers. P sues D for damages. What decision?
9. D threw a lighted squib into a market place. It fell in the stall of B. B, to prevent injury to himself, cast it away. It fell in the stall of C. C, to save himself, threw it from his stall. In this flight it exploded and injured P. P sues D for damages. What decision?
10. D negligently leaves P's pasture bars down. P knows that his cows are out and are wandering in the direction of his cornfield, but takes no measures to stop them. P sues D for the damage done to his corn by the cows. What decision?
11. P's intestate is injured through the negligence of D. In a fit of despondency caused by the injury, P's intestate commits suicide. In an action by P against D, what is the extent of D's liability?

LANE *v.* ATLANTIC WORKS

111 Massachusetts Reports 136 (1872)

Tort. The declaration alleged, in substance, that the defendant had wrongfully left in a public highway in Boston a truck so carelessly loaded with iron that the iron would easily fall off; and that the plaintiff being lawfully in the highway and in the exercise of due care was injured by the said iron which was thrown and fell upon him in the consequence of the defendant's negligence.

On the trial in the Superior Court before DEVENS, J., the plaintiff introduced evidence showing that the defendant's truck was left stand-

ing in front of their works in Marion Street; that the iron was not fastened, but would easily roll off the truck, that the plaintiff, Fergus Lane, was walking with another boy in the street opposite the truck when Horace Lane, a boy of twelve called them to come over and see Jim move the truck; that the plaintiff went over and stood near the truck and Horace moved it and that the iron rolled off and injured the plaintiff's leg and that he himself had not touched the truck or iron. The court refused to give the following instruction as requested by defendant: "While it is true that negligence alone on the part of Horace Lane, which contributed to the injury combining with the defendant's negligence, would not prevent a recovery unless the plaintiff's negligence also concurred as one of the contributory causes; yet if the fault of Horace Lane was not negligence, but a voluntary meddling with the truck or iron, for an unlawful purpose, and wholly as a sheer trespass, and this culpable conduct was the direct cause of the injury which would not have happened otherwise, the plaintiff cannot recover."

The jury returned a verdict for the plaintiff for $6,000 and the defendants allege exceptions.

COLT, J. In actions of this description, the defendant is liable for the natural and probable consequences of his negligent act or omission. The injury must be the direct result of the misconduct charged; but it will not be considered too remote if, according to the usual experiences of mankind, the result ought to have been apprehended.

The act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen. The original negligence still remains a culpable and direct cause of the injury. The test is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise.

Whether in any given case the act charged was negligent, and whether the injury suffered was, within the relation of cause and effect, legally attributable to it, are questions for the jury. They present oftentimes difficult questions of fact, requiring practical knowledge and experience for their settlement, and where there is evidence to justify the verdict, it cannot be set aside as a matter of law. The only question of the court is, whether the instruction given upon these points stated the true tests of liability.

Under the law as laid down by the court the jury must have found the defendant guilty of negligence in doing that from which injury might reasonably have been expected, and from which injury resulted; that the plaintiff was in the exercise of his due care; that Horace Lane's act was not the sole, direct or culpable cause of the injury; that he did not purposely roll the iron upon the plaintiff; and that the plaintiff was not a joint actor with him in the transaction. This supports the verdict. It is immaterial whether the act of Horace Lane was mere negligence or voluntary intermeddling. It was an act which the jury have found the defendants ought to have apprehended and provided against.

Exceptions overruled.

QUESTIONS

1. Was the defendant physically the cause of the injury which the plaintiff suffered? What test did the court lay down for determining the liability of the defendant?
2. Is the principal case distinguishable from the case of *Gilman* v. *Noyes*?
3. A servant of the D Company negligently left an unguarded engine on a switch for a few minutes. X, not in any way connected with the D Company, officiously started the engine. In its uncontrolled course the engine ran into a passenger train, a half a mile away, and injured P. P sues D for damages. What decision?
4. D negligently left a barrel of fish brine on the sidewalk near his market. X, a third person, poured the brine into the gutter. P's cow licked the brine and died. P sues D and X separately. What decision in each case?
5. D sold X, a retailer, a defective automobile wheel. X, ignorant of its defect, sold it to P. P suffered an injury in a smash-up as a result of the defective wheel. P sues D for damages. What decision?
6. D threw a sack of cement from the top of a building, shouting as he threw it: "Look out, below!" P, passing by, looking up to see what was happening, became excited and jumped under the falling sack. Had he stood still he would not have been injured. P sues D for damages. What decision?

DAVIES *v.* MANN

10 Meeson and Welsby's Reports 546 (1842)

This was an action of case for negligence. At the trial before ERSKINE, J., it appeared that the plaintiff, having fettered the fore feet of an ass belonging to him, turned it into a public highway, and at the time in question the ass was grazing on the off side of a road

about eight yards wide, when the defendant's wagon, with a team of horses, coming down a slight descent at what the witness termed a smartish pace ran against the ass, knocked it down, and the wheels passing over it, it died soon after. The ass was fettered at the time, and it was proved that the driver of the wagon was some little distance behind the horses. The learned Judge told the jury, that though the act of the plaintiff in leaving the donkey on the highway so fettered as to prevent his getting out of the way of carriages traveling along it, might be illegal, still, if the proximate cause of the injury was attributable to the want of proper conduct on the part of the driver of the wagon, the action was maintainable against the defendant; and his Lordship directed them, if they thought that the accident might have been avoided by the exercise of ordinary care on the part of the driver, to find for the plaintiff. The jury found their verdict for the plaintiff, damages 40 pounds.

LORD ABINGER, C. B. I am of the opinion that there ought to be no rule in this case. The defendant has not denied that the ass was lawfully in the highway, and therefore we must assume it to have been lawfully there; but even were it otherwise, it would have made no difference, for as the defendant might, by proper care, have avoided injuring the animal, and did not, he is liable for the consequences of his negligence though the animal may have been improperly there.

PARKE, B. This subject was fully considered by this Court in the case of *Bridge* v. *The Grand Junction Railway Company*, where, as appears to me, the correct rule is laid down concerning negligence, namely, that the negligence which is to preclude a plaintiff from recovering in an action of this nature, must be such as that he could, by ordinary care, have avoided the consequences of the defendant's negligence. I am reported to have said in that case, and I believe quite correctly, that "the rule of law laid down with perfect correctness in the case of *Butterfield* v. *Forrester*, that, although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover; if by ordinary care, he might have avoided them, he is the author of his own wrong." In that case of *Bridge* v. *Grand Junction Railway Co.*, there was a plea imputing negligence on both sides; here it is otherwise; and the Judge simply told the jury, that the mere fact of negligence on the part of the plaintiff in leaving the donkey on the highway so fettered

was no answer to the action unless the donkey's being there was the immediate cause of the injury; and that if they were of opinion that it was caused by the fault of the defendant's servant in driving too fast, or which is the same thing, at a smartish pace, the mere fact of putting the ass upon the road would not bar the plaintiff of his action. All that is perfectly correct; for, although, the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road.

Rule refused.

QUESTIONS

1. Did the defendant wholly cause the injury complained of in the principal case?
2. Did the plaintiff exercise due care in fettering the feet of his donkey and leaving the animal in a public highway?
3. What instruction did the trial judge give to the jury? Was the instruction correctly given? What rule of law is involved in this instruction?
4. P's intestate negligently went on the tracks of the D Company and was killed by a passing train. P sues D for damages. What decision?
5. P boarded a train of the D Company while it was standing still. The train started without giving the warning required by statute. P jumped from the train while in motion and was injured. P sues D Company for damages. What decision?
6. The D Company negligently failed to maintain cattle guards and fences as required by law. P negligently permitted his horse to run at large. The horse strayed on the tracks of the company and was killed by a passing train. From aught that appears to the contrary, the train was being carefully operated at the time of the injury. P sues D for damages. What decision?
7. Due to negligence on the part of D, P's house was set on fire. P, however, took no steps to extinguish it. P sues D. What decision?
8. P is negligently walking on the tracks of the D Company at night. An engine of the company is being negligently operated without a headlight. When the engineer discovers P, it is too late to stop the engine, but he rings the bell vigorously. When P hears the bell, it is too late for him to reach a place of safety. P sues D for the injury sustained. What decision?
9. An engineer on a fast mail sees X, a tramp, on the tracks. He runs over him, although he blows the whistle and rings the bell. P, X's

personal representative, sues the company for damages. What decision?

10. The engineer sees a tramp strolling down the tracks. He rings the bell and blows the whistle, but does not slacken his speed, thinking that the trespasser will be able to reach a place of safety, which he might have done had he heeded the warning. What is the liability of the company for the injury?

BROWN *v.* KENDALL

6 Cushing's Massachusetts Reports 292 (1850)

This was an action of trespass for assault and battery, originally commenced against George K. Kendall, the defendant, who died pending suit, and his executrix was summoned in. Verdict and judgment for the plaintiff.

It appeared in evidence, on the trial, which was before WELLS, C. J., in the court of common pleas, that two dogs belonging to the plaintiff and the defendant, respectively, were fighting in the presence of their masters; that the defendant took a stick about four feet long, and commenced beating the dogs in order to separate them; that the plaintiff was looking on, at the distance of about a rod, and he advanced a step or two toward the dogs. In their struggle, the dogs approached the place where the plaintiff was standing. The defendant retreated backwards from before the dogs, striking them as he retreated; and as he approached the place where the plaintiff was standing, with his back toward him, in raising his stick over his shoulder, in order to strike the dogs, he accidentally hit the plaintiff in the eye, inflicting upon him a severe injury.

SHAW, C. J. The facts set forth in the bill of exceptions preclude the supposition, that the blow, inflicted by the hand of the defendant upon the person of the plaintiff was intentional. The whole case proceeds on the assumption that the damage sustained by the plaintiff from the stick held by the defendant was inadvertent and unintentional; and the case involves the question how far, and under what qualifications the party by whose unconscious act the damage was done is responsible for it. We use the term "unintentional" rather than involuntary, because in some of the cases, it is stated, that the act of holding and using a weapon or instrument, the movement of which is the immediate cause of hurt to another, is a voluntary act, although its particular effect in hitting and hurting another is not within the purpose of intention of the party doing the act.

We think, as the result of all authorities, the rule is correctly stated by Mr. Greenleaf, that the plaintiff must come prepared with evidence to show either that the *intention* was unlawful, or that the defendant was in *fault;* for if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be liable, 2 Greenl. *Ev.* §§85–92; *Wekeman* v. *Robinson*, 1 Bing. 213. If in the prosecution of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom. *Davis* v. *Saunders*, 2 Chit. R. 639; *Vincent* v. *Stinchour*, 7 Verm 69. In applying these rules to the present case, we can perceive no reason why the instructions asked for by the defendant ought not to have been given to this effect, that if both plaintiff and defendant at the time of the blow were using ordinary care, or if at that time the defendant was using ordinary care, and the plaintiff was not, or if at that time, both the plaintiff and defendant were not using ordinary care, then the plaintiff could not recover.

In using this term, ordinary care, it may be proper to state, that what constitutes ordinary care will vary with the circumstances of cases. In general it means that kind and degree of care, which prudent and cautious men would use, such as is necessary to guard against probable danger.

A man who should have occasion to discharge a gun on an open and extensive marsh, or in a forest, would be required to use less circumspection and care, than if he were to do the same thing in an inhabited town, village or city. To make an accident, or casualty, or as the law sometimes states it, inevitable accident, it must be such an accident as the defendant could not have avoided by the use of the kind of degree and care necessary to the exigency, and in the circumstances in which he was placed.

We are not aware of any circumstances in this case, requiring a distinction between acts which it was lawful and proper to do and acts of legal duty. There are cases undoubtedly, in which officers are bound to act under process, for the legality of which they are not responsible, and perhaps some others in which this distinction would be important. We can have no doubt that the act of the defendant, in attempting to part the fighting of the dogs, one of which was his own, and for the injurious acts of which he might be responsible, was a lawful and proper act, which he might do by proper and safe means. If, then, in doing this act, using due care and all proper precautions necessary to the exigency of the case to avoid hurt to others, in

raising his stick for that purpose, he accidently hit the plaintiff in the eye and wounded him, this was the result of pure accident, or was involuntary and unavoidable, and therefore, the action would not lie. Or, if the defendant was chargeable with some negligence, and if the plaintiff was also chargeable with negligence. We think the plaintiff cannot recover without showing that the damage was caused wholly by the act of the defendant, and that the plaintiff's own negligence did not contribute as an efficient cause to produce it.

The court instructed the jury that if it was not a necessary act, and the defendant was not in duty bound to part the dogs, but might with propriety interfere or not, as he chose, the defendant was responsible for the consequences of the blow, unless it appeared that he was in the exercise of extraordinary care, so that the accident was inevitable, using the word not in the strict sense, but a popular sense. This is to be taken in connection with the charge afterwards given, that if the jury believed that the act of interference in the fight was unnecessary (that is as before explained, not a duty incumbent on the defendant) then the burden of proving extraordinary care on the part of the defendant, or want of ordinary care on the part of the plaintiff was on the defendant.

The court is of opinion that these directions were not conformable to law. If the act of hitting the plaintiff was unintentional on the part of the defendant, and done in the doing of a lawful act, then, the defendant was not liable, unless it was done in the want of exercise of due care, adapted to the exigency of the case, and therefore, such want of due care became part of the plaintiff's case, and the burden of proof was on the plaintiff to establish it. *Powers* v. *Russel*, 13 Pick. 69, 76; *Tourtellot* v. *Rosebrook*, 11 Met 460.

Perhaps the learned judge, by the use of the term extraordinary care, in the above charge, explained as it is by the context, may have intended nothing more than that increased degree of care and diligence, which the exigency of particular circumstances might require, and which men of ordinary care and prudence would use under like circumstances to guard against danger. If such was the meaning of this part of the charge, then it does not differ from our views, as above explained. But we are of opinion, that the other part of the charge, that the burden of proof was on the defendant, was incorrect. Those facts which are essential to enable the plaintiff to recover, he takes the burden of proving. The evidence may be offered by the plaintiff or by the defendant; the question of due care, or want of care, may be essentially connected with the main facts, and arise from the same

proof; but the effect of the rule, as to the burden of proof, is this, that when the proof is all in, and before the jury, from whatever side it comes, and whether directly proved, or inferred from circumstances, if it appears that the defendant was doing a lawful act, and unintentionally hit and hurt the plaintiff, then, unless it also appears to the satisfaction of the jury that the defendant is chargeable with some fault, negligence, carelessness, or want of prudence, the plaintiff fails to sustain the burden of proof, and is not entitled to recover.

New trial ordered.

QUESTIONS

1. What instruction did the trial court give to the jury? What instruction should have been given?
2. Was not the defendant's act an indispensable antecedent of the plaintiff's injury? If so, why should not the defendant be compelled to compensate the plaintiff for the injury?
3. What test did the court lay down in this case for determining the culpability of the defendant? Apply this test to the facts of the case.
4. Was the defendant's act intentional, negligent, or accidental?
5. The D Express Company received a box containing nitroglycerine, although there was nothing on the box to indicate its dangerous contents. A servant of the D Company attempted to open it with a hammer. An explosion followed the attempt and destroyed a part of the plaintiff's building. P sues D for damages. What decision?

HOBART *v.* HAGGET

12 Maine Reports 67 (1835)

Action of trespass for the alleged taking and converting to his own use by the defendant, an ox, the property of the plaintiff. The general issue was pleaded and joined in. The jury returned a verdict for the plaintiff. The defendant alleged exceptions.

PARRIS, J. The ox taken by the defendant was the property of the plaintiff, and although the defendant attempted to prove that he purchased that ox and consequently had a right to take it, the attempt wholly failed. He may have considered himself as the purchaser, but unless the plaintiff assented to it, no property passed. The assent of both minds was necessary to make the contract. The court below charged the jury that, if they were satisfied there had been an innocent mistake between the parties and that the defendant had supposed he had purchased the ox in question, when in fact the plaintiff supposed that he was not selling that ox but another, that

they would find for the plaintiff. The jury having found for the plaintiff have virtually found that he did not sell the ox in controversy, and the question is raised whether the defendant is liable in trespass for having taken it by mistake. It is contended that where the act complained of is involuntary and without fault, trespass will not lie, and sundry authorities have been referred to in support of that position.

But the act complained of was not involuntary. The taking of the plaintiff's ox was the deliberate and voluntary act of the defendant. He might not have intended to commit a trespass in so doing. Neither does the officer, when on a precept against A, he takes by mistake the property of B, intend to commit a trespass; nor does he intend to become a trespasser, who believing that he is cutting into timber on his own land, by mistaking the line of division, cuts on his neighbor's land; and yet in both cases, the law would hold them trespassers.

The case of *Higginson* v. *York*, 5 Mass. 341, was still stronger than either of those above supposed. In that case one Kenniston hired the defendant to take a cargo of wood from Burntcoat Island to Boston. Kenniston went with the defendant to the island, where the latter took the wood on board his vessel and transported it to Boston, and accounted for it to Kenniston. It turned out on trial that one Phinney had cut this wood on the plaintiff's land without right or authority, and sold it to Kenniston. York, the defendant, was held liable to the plaintiff for the value of the wood in an action of trespass committed by Phinney. A mistake will not excuse a trespass. Though the injury has proceeded from mistake the action lies, for there is some fault from neglect and want of proper care, and it must have been done voluntarily. *Basely* v. *Clarkson* 3 Legv. 37. Nor is the intent or the design of the wrongdoer the criterion as to the form of remedy, for there are many cases in the books where the injury being direct and immediate, trespass has been holden to lie though the injury was not intended as in *Guille* v. *Swan* 19 Johns. 381, where the defendant ascended in a balloon which descended into the plaintiff's garden; and the defendant being entangled, and in a perilous situation, called for help, and a crowd of people broke through the fence into the plaintiff's garden, and beat down and trod in his vegetables, the defendant was held answerable in trespass for all the damage done to the garden. In this case, SPENCER, C. J., said: "The intent with which an act is done is, by no means, the test of the liability of a party in an action of trespass. If the act

caused the immediate injury, whether it was intentional or unintentional, trespass is the proper action to redress the wrong. See also 1 Pothier, art. 1. sec. 1. Summer, 219, 307.

The exceptions are overruled and there must be judgment on the verdict.

QUESTIONS

1. What action was brought in the principal case? With what offense was the defendant charged?
2. What instruction did the court give to the jury? What rule of law is involved in this instruction?
3. Was the act complained of intentional, negligent, or accidental?
4. Was the defendant's conduct in any real sense culpable?
5. D is driving cattle to market. A steer belonging to P gets into the herd without D's knowledge or fault. D sells the steer at the market, honestly thinking that it is his own. P sues D in trover for conversion of the steer. What decision?
6. D, honestly believing that a piece of land is his, goes on it and cuts trees. P, the owner of the land, sues D for damages. What decision?
7. D published in his newspaper an article describing the conduct of a prisoner in the criminal court, designating him as "H. P. Hanson, real estate and insurance broker of South Boston." The article was true except that the man referred to was A. H. P. Hanson. H. P. Hanson, also a real estate and insurance agent of South Boston, brought an action against D for libel. What decision?

FLETCHER *v.* RYLANDS

Law Reports 3 House of Lords Cases 330 (1868)

LORD CHANCELLOR CAIRNS. My Lords, in this case the plaintiff is the occupier of a mine and works under a close of land. The defendants are the owners of a mill in his neighborhood, and they proposed to make a reservoir for the purpose of keeping and storing water to be used about their mill upon another close of land, which, for the purpose of this case, may be taken as being adjoining to the close of the plaintiff, although, in point of fact, some intervening land lay between the two. Underneath the close of land of the defendants on which they proposed to construct their reservoir there were certain old and disused mining passages and works. There were five vertical shafts, and some horizontal shafts communicating with them. The vertical shafts had been filled up with soil and rubbish, and it does not appear that any person was aware of the existence either of the vertical shafts or of the horizontal works communicating with them.

In the course of the working by the plaintiff of his mine, he had gradually worked through the seams of coal underneath the close, and had come into contact with the old and disused works underneath the close of the defendants.

In that state of things the reservoir of the defendants was constructed. It was constructed by them through the agency and inspection of an engineer and a contractor. Personally, the defendants appear to have taken no part in the works, or to have been aware of any want of security connected with them. As regards the engineer and the contractor, we must take it from the case that they did not exercise, as far as they were concerned, that reasonable care and caution which they might have exercised, taking notice, as they appear to have taken notice, of the vertical shafts filled up in the manner which I have mentioned. However, my Lords, when the reservoir was constructed and filled, or partly filled, with water, the weight of the water bearing upon the disused and imperfectly filled-up vertical shafts broke through those shafts. The water passed down them and into the horizontal workings, and from the horizontal workings under the close of the defendants it passed on into the workings under the close of the plaintiff, and flooded his mine, causing considerable damage, for which this action was brought.

The Court of Exchequer, when the special case stating the facts to which I have referred, was argued, was of opinion that the plaintiff had established no cause of action. The Court of Exchequer Chamber, before which an appeal from this judgment was argued, was of a contrary opinion, and the judges there unanimously arrived at the conclusion that there was a cause of action, and that the plaintiff was entitled to damages.

My Lords, the principles on which this case must be determined appear to me to be extremely simple. The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if, in what I may term the natural use of that land, there had been any accumulation of water, either on the surface or underground, which had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so, by leaving or by interposing, some barrier between his close and the close of the defendants in order to

have prevented that operation of the laws of nature. On the other hand, if the defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land, and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and pass off into the close of the plaintiff, then it appears to me that that which the defendants were doing they were doing at their own peril; and if in the course of their doing it, the evil arose to which I have referred, the evil, namely, of the escape of the water and its passing away to the close of the plaintiff and injuring the plaintiff, then for the consequences of that, in my opinion, the defendants would be liable.

The same result is arrived at on the principles referred to by Mr. JUSTICE BLACKBURN in his judgment, in the Court of Exchequer Chamber, where he states the opinion of that court as to the law in these words: "We think that the true rule of law is that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default, or perhaps, that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is beaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbor's alkali works, is damnified without any fault of his own; and it seems reasonable and just that the neighbor, who has brought something on his own property (which was not naturally there) harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbor's land should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in

bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority this we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches."

My Lords, in that opinion, I must say I entirely concur. Therefore, I have to move your Lordships that the judgment of the Court of Exchequer Chamber be affirmed, and that the present appeal be dismissed with costs.

QUESTIONS

1. What test did the court lay down in determining the liability of the defendant? Apply the test to the facts of this case.
2. Can the conclusion of the court be justified by the application of any other test of liability?
3. D keeps a tiger chained in a cage on his premises. The animal escapes and does considerable damage in the neighborhood. What is the test of the liability of D for the damages caused by the tiger?
4. D stores dynamite on his premises to be used in blasting stumps. An explosion occurs and throws débris on P's land. What is the test of D's liability to P?
5. D makes an excavation on his land in its natural state as carefully as he can. P's land caves in as a result of D's excavation. P sues D for damages. What decision?
6. D put extract of belladonna, a poison, into a jar labeled "Extract of Dandelion," a harmless drug, and sold it as extract of dandelion to a retailer. The latter sold it to P who was poisoned by it. P sues D for damages. What decision?
7. D starts a fire on his land which gets beyond his control, spreads to P's land, and burns his house. What is the test of D's liability to P?

CITY OF CHICAGO *v.* STURGES

222 United States Reports 313 (1911)

LURTON, J. The only question under this writ of error is as to the validity of a statute of the State of Illinois entitled "An Act to indemnify the owners of property for damages occasioned by mobs and riots." Laws of 1887, p. 237.

The defendant in error recovered a judgment against the city under that statute, which was affirmed in the Supreme Court of the State. 237 Illinois, 46. The validity of the law under the Illinois constitution was thus affirmed and that question is thereby foreclosed.

But it was urged in the Illinois courts that the act violated the guarantee of due process of law and the equal protection of the law as provided by the Fourteenth Amendment of the Constitution of the United States.

By the provision of the statute referred to, a city is made liable for three-fourths of the damage resulting to property situated therein caused by the violence of any mob or riotous assemblages of more than twelve persons, not abetted or permitted by the negligent or wrongful act of the owner, etc. If the damage be to property not within the city, the county in which it is located is in like manner made responsible. The act saves to the owner his action against the rioters and gives the city or county, as the case may be, a lien upon any judgment against such participants for reimbursement, or a remedy to the city or county directly against the individuals causing the damage, to the amount of any judgment it may have paid to the sufferer.

It is said that the act denies to the city due process of law, since it imposes liability irrespective of any question of the power of the city to have prevented the violence, or of negligence in the use of its power. This was the interpretation placed upon the act by the Supreme Court of Illinois. Does the law as thus interpreted deny due process of law? That the law provides for a judicial hearing and a remedy over against those primarily liable narrows the objection to the single question of legislative power to impose liability regardless of fault.

It is a general principle of our law that there is no individual liability for an act which ordinary human care and foresight could not guard against. It is also a general principle of the same law that a loss from any cause purely accidental must rest where it chances to fall. But behind and above these general principles which the law recognizes as ordinarily prevailing, there lies the legislative power, which, in the absence of organic restraint, may, for the general welfare of society, impose obligations and responsibilities otherwise non-existent.

Primarily, governments exist for the maintenance of social order. Hence it is that the obligation of the government to protect life, liberty, and property against the conduct of the indifferent, the careless, and the evil-minded may be regarded as laying at the very foundation of the social compact. A recognition of this supreme obligation is found in those exertions of the legislative power which

have as an end the preservation of social order and the protection of the welfare of the public and of the individual. If such legislation be reasonably adapted to the end in view, affords a hearing before judgment, and is not forbidden by some other affirmative provisions of the constitutional law, it is not to be regarded as denying due process of law under the provision of the Fourteenth Amendment.

The law in question is a valid exercise of the police power of the State of Illinois. It rests upon the duty of the state to protect its citizens in the enjoyment and possession of their acquisitions, and is but a recognition of the obligation of the state to preserve social order and the property of the citizen against the violence of a riot or a mob.

Judgment affirmed.

QUESTIONS

1. What is meant by the "police power of a state"?
2. What is the theory of the liability created by the state under consideration in the principal case?
3. What constitutional objection was urged against the validity of this law?
4. A statute provides that an employer shall be responsible to employees for all injuries sustained by them in the course of their employment unless the injuries result from the wilful misconduct of the employees. What is the theory of liability of such a statute?
5. An ordinance forbids the driving of automobiles within the city limits at a rate of speed in excess of 15 miles an hour. D, driving 18 miles an hour, injures P. P sues D for damages. D offers to show that, though driving 18 miles an hour, he was driving with extreme care. Is the evidence admissible?
6. A statute forbids the running of trains on Sunday. The D Company ran a train in violation of the statute and ran over a fire hose of the village of P. What is the test of liability of D to P?
7. An ordinance forbids passengers to ride on the platforms of street cars. P was riding on the platform of a street car in violation of the ordinance. D, driving an ice wagon, recklessly ran into the car and injured P. P sues D for damages. What decision?

CHAPTER IV

CONTRACTS

1. Introductory Topics

A

No other single subject in the whole field of the law throws so much light on the organization and working of our present economic society as the Law of Contracts. In a broad sense, it may be said that this society is itself based on a contract or agreement of all its members. They are in a very real sense partners, engaged in a vast co-operative scheme in the production of things with which to satisfy human wants and needs. This productive machine is not controlled by custom nor is it regulated by external authority, but is left to the guidance of the individual members of society. These members by their voluntary agreements and undertakings make it what they will.

But in a narrower and a strictly technical sense it may be truly said that the Law of Contracts is at the foundation, if not the foundation itself, of our present society. One can scarcely conceive of the present organization of society or of its functioning without recognizing the existence of a law of contracts or its substantial equivalent. Those who are engaged in this co-operative scheme must have official recognition of some device for making future and binding arrangements, for securing the present and future conduct of others similarly engaged, for shifting their risks to professional risk-bearers, and for securing the exchange of property and values. Modern industrial society could not exist without in some way assuring these things to those engaged in its activities. It does make these guaranties to its members and it does so through the Law of Contracts.

Our present law of contracts is not a mere historical accident, although historical accidents figure largely in its origin and growth. Nor is it a phenomenon, existing a priori, to which society has adjusted and adapted itself. It is, however, a body of rules which has evolved in response to the demands of society and has developed with its changing needs. The Law of Contracts, whether perfect or imperfect, is just what society has made it.

B

"The law on contract may be described as the endeavor of the State, a more or less imperfect one by the nature of the case, to establish a positive sanction for the expectation of good faith which has grown up in the mutual dealings of men of average right-mindedness. Accordingly, the most popular description of a contract that can be given is also the most exact one, namely, that it is a promise or set of promises which the law will enforce."[1] A study of contracts is, therefore, a study of promises.

What are these things which we call promises? Promises, obviously enough, are statements which men make to each other in their mutual dealings. But what kinds of statements are they? How do they differ from other types of statements which men may make to each other? In short, what is the essence of a promise?

All statements which men may make can be divided into two classes: those which have legal consequences, and those which are without legal consequences. Legally inconsequential statements are those to which reasonable-minded persons pay no attention; legally consequential statements are those which in some way affect the conduct of reasonable people. The law ignores the former but cannot ignore the latter. It must and does regulate the making of the latter by imposing appropriate liability on the one who makes them.

Legally consequential statements (*a*) may relate to past or present facts or (*b*) they may pertain to the future. A statement of a past or present fact which influences the conduct of a reasonable person is a *representation*. If the statement is made with knowledge of its falsity, if it is made with intent to deceive another, if it actually deceives, and if it causes damage to the other, it is a *fraudulent representation*. The defrauded person is entitled to recover damages in an action of deceit for the injury he has suffered. Or, if he was induced by the fraudulent representation to enter into a contractual relation with the other, he is entitled to a rescission of the contract and a restoration to his *status quo*.

If, on the other hand, a misrepresentation of fact is innocently made, the legal consequences of it are not so serious or far-reaching. Mere innocent deception, even though it may cause damage, is not an actionable wrong. The plaintiff, to recover for deception, must not only show a false statement of fact on which he reasonably relied,

[1] Pollock, *Principles of Contract* (8th ed.), p. 1.

but he must also show that it was made with knowledge of its falsity. However, the law will not compel the deceived person to perform a contract which he was induced to enter into by innocent misrepresentations. It gives to him the power to rescind the agreement in a court of equity and to recover back anything which he has given to the other person in performance of it. The law will not permit a person to profit actively from deception of others, even though the deception be innocent.

Again, a representation may create legal consequences by *estoppel*. If a person makes a representation which causes another to change his position in reliance on it, the former is said to be estopped, as against the latter, to deny the truth of the representation, whether he knew it was false or not. If a person speaks when he should not speak about some past or present fact, he will not be permitted later to unsay what he has said as against one who has changed his position in reliance on the statement. Moreover, if he fails to speak when he should speak, the law will not thereafter permit him to speak if his speaking then will hurt someone who has reasonably relied on his conduct. "Whatever a man's real intention may be, he is deemed to act wilfully, 'if he so conducts himself that a reasonable man would take the representation to be true and believe that it was meant that he should act upon it.' The rule is not a rule of substantive law, in the sense that it does not declare any immediate right or claim. It is a rule of evidence, but capable of having the gravest effects on the substantive rights of parties."[1]

In contrast with those statements which relate to past or present facts, there is a large class of statements which pertain to the future. They are statements of intention of future conduct or future acts. They do not predicate the past or present existence of things, but assert that they will exist in the future. They are made under such circumstances that they affect the conduct of reasonable-minded persons. Such statements may be designated as *promises*. Promises are the legal phenomena with which the Law of Contracts is primarily concerned. "The specific mark of contract is the creation of a right, not to a thing, but to another man's conduct in the future. He who has given a promise is bound to him who accepts it, not merely because he had or expressed a certain intention, but because he so expressed himself as to entitle the other party to rely on his acting in a certain way."[2]

[1] Pollock, *Principles of Contracts* (8th ed.), p. 557. [2] *Ibid.*, p. 1.

Finally, in a contract we have a statement which is accompanied by still a different train of legal consequences. Such statements are known as *conditions*. "A condition is a fact or event which must precede some change in the legal relations of two parties. To constitute a condition, however, the fact in question must be uncertain. Thus in the case of a promise to pay $100 on the 1st of January next is not a condition, for the reason that the day is sure to arrive. Nor is a promise to pay within a certain time after a man's death conditional, because the death is certain to occur. . . . . The uncertainty in regard to a fact which makes that fact a condition need not be objective uncertainty; it is sufficient if that uncertainty exists in the mind of the party who seeks to treat that fact as a condition."[1]

If the fact or event, the existence of which one party to the agreement predicates, turns out to be non-existent, the other is relieved of his duty under the contract. The law gives him the privilege of treating the contract as at an end. In the case of *Davis* v. *Von Lingen*, 113 U. S. 40, on August 1, A executed to B a charter of the steamship Whickham, "*now sailing or about to sail from Benizaf with cargo for Philadelphia.*" As a matter of fact the vessel was then loading at Benizaf and did not sail until August 7. The court was of the opinion that the statement as to the location of the vessel was a condition and not mere words of description. There was, therefore, under the facts of the case a breach of a condition and B was permitted to consider the contract at an end.

We have examined briefly various types of statements which men may make in their dealings with each other and have pointed out some of the legal consequences which normally flow from each type. In so doing, by definition and comparison, it is hoped that we have located the province of the statements which we are accustomed to call a *promises*. Promises, or statements of future intention, as pointed out above, are the legal phenomena with which the Law of Contracts is primarily concerned. Under certain circumstances, as we shall later see, they become binding on the persons who utter them. But this had not always been true. There was a time when the law, under no circumstances, attached legal consequences to them as promises. It is, therefore, necessary and desirable to turn our attention to legal history and briefly trace the development of the enforcibility of promises.

[1] Harriman, *Law of Contracts* (2d ed.), section 299.

C

In an early stage of the development of any race or people, we find them essentially nomadic, more or less military, and non-trading in character. They are nomadic because it is easier to reap where they have not sown than to do otherwise. They must, to a greater or lesser degree, be military in character in order to live their nomadic lives. They do not engage in trading to any great extent, because trading is unnecessary when they are able to take what they want as they wander to and fro.

In such a stage of development, one does not expect to find, and, indeed, one does not find, many obligations which resemble in any degree our modern contractual obligations, based upon promises. We do find a rude promissory oath of allegiance to their leader or chieftain. We do find certain primitive obligations with respect to tribal property. We also find the custom of giving and receiving hostages as an assurance of certain kinds of future conduct.

Without attempting to trace the development of obligations from primitive times and from primitive notions, let us look at the situation in England, say about the close of the twelfth century. The social organization is still essentially a military one. England is organized on a feudalistic basis and the manor is the unit of organization. The people are permanently settled and almost indissolubly attached to their respective manorial organizations. They are primarily engaged in agricultural pursuits, except when called upon by the lords of the manors to perform military duties. The manors are self-sufficing. The whole organization is non-commercial in character. It is under the rigid control of custom.

In such a stage of society, obviously enough, their transactions will be simple and relatively few in number. These few transactions will be marked by certain characteristics. On the one hand, they will deal primarily with formal relations, the making of which will be formalistic and ceremonious. On the other hand there will be transactions like exchanges of goods or barter, pledging of goods, and loaning of goods. The parties to such transactions will, more or less naturally, think in terms of tangible objects and will deal *in praesenti* and not *in futuro*.

At the time of which we are speaking, we find recognized in the early English law two main classes of obligations which bear some resemblance to our modern contractual obligations. As would be expected, there is a class of obligations based upon the fact that the

defendant has undertaken in a formal way to do something. There is another class of obligations founded upon the theory that a wrong has been done the plaintiff by the defendant in respect to some tangible, personal property owned by the former.

If the defendant in writing, under his seal, admitted a debt owing to the plaintiff, as a matter of evidence, he was concluded by the formal writing, unless he were able to impeach the seal. As one writer said: "In a day when the judicial means of establishing disputed facts were crude, it is not strange that a mysterious sanctity should attach to a writing, bearing a defendant's seal."[1] In the beginning the theory was that the obligor would not be permitted to dispute the contents of the writing, if he admitted the genuineness of his seal. In the course of time the writing ceased to be regarded as evidence of the obligation and became the obligation itself. As such it became known as a common law specialty and was enforcible in the action of debt, which will be discussed in a later connection.

At the time when Glanville wrote, near the close of the twelfth century, "the king's courts," as he says, "do not intermeddle with contracts founded on merely private agreement." They were not enforcible unless they were sealed and made of record, in which event they became public covenants.[2] But later on the king's courts began to enforce undertakings known as covenants in an action known as covenant. The form necessary to make an undertaking enforcible by the writ of covenant was that the undertaking should have been put in permanent and visible form and authenticated by the person binding himself. Originally, it seems, signing by the obligor was a sufficient authentication. But the courts were not yet ready to hold that all promises put in writing were enforcible. Accordingly, it came to be required that the undertaking should be authenticated by the affixing of the obligor's own proper seal to the instrument. At this time, as pointed out by one writer, "the action of covenant was the only action in which an executory contract could be enforced and unliquidated damages recovered."[3]

Obligations based upon the theory that a wrong had been done the plaintiff by the defendant in respect to some tangible, personal property of his were enforcible in *debt*, *detinue*, and *account*, so far as we are now interested in them.

[1] II Street, *Foundations of Legal Liability*, p. 8.

[2] *Ibid.*, p. 10. [3] II Holdsworth, *History of the English Law*, p. 310.

The action of *account* was founded upon a duty to account which arose when one received money as a trustee for payment to the plaintiff. The theory was that the defendant, having money belonging to the plaintiff, was perpetrating a wrong upon him by not accounting to him for it. This action was in frequent use during the fourteenth and fifteenth centuries. Its place was later taken by a bill in equity for an account and the common count in *indebitatus assumpsit* for money had and received to the use of the plaintiff.

Originally, debt as an action was used to recover specific property which in law rightfully belonged to the plaintiff. "Even when the subject of the action was a sum of money, the mind of the framer of the writ is evidently bent on getting back the specific coins lent. There is no question of 'debt' in the wide modern sense, which includes any liability to pay money. The defendant is to restore the very coins lent."[1] But in the course of time, detinue developed from debt as the proper remedy for the recovery of chattels which the plaintiff was rightfully entitled to and debt became exclusively a remedy for the recovery of a sum certain of money owed by the defendant to the plaintiff. But even so, the theory survived that the defendant had something which belonged to the plaintiff and that his refusal to turn that something over to the plaintiff was a wrong to the latter. Suppose, for instance, that A had bargained to sell his horse to B for 100 pounds, and that B had given a penny to bind the bargain. This transaction operated to create obligations by two grants: by it the seller transferred and granted his horse to the buyer, and the buyer transferred and granted to the seller a debt.[2] In other words, after the transaction, the seller had in his possession a horse which belonged to the buyer, and the buyer had in his possession a sum of money which belonged to the seller. The theory was not that B owed A an intangible obligation, but that he had in his possession a tangible object, a certain sum of money, belonging to A. The very judgment in debt ran that the plaintiff "have and recover his debt."

But the action did not lie unless the plaintiff was able to prove that the defendant was under a duty to hand over the debt to the plaintiff. In order to establish this duty, the plaintiff had to show that he had passed something to the defendant for the debt which he was seeking to recover. This something was termed the *quid pro quo*. If A loaned B 100 pounds, the loan of the 100 pounds was the *quid*

[1] Jenks, *A Short History of English Law*, p. 58.

[2] II Holdsworth, *History of the English Law*, p. 312.

pro quo for B's debt of 100 pounds. If A sold B a horse for 50 pounds the horse was the *quid pro quo* for B's debt. The lease of property was also sufficient as a *quid pro quo* for a debt. Later, the performance of personal services by the plaintiff at the request of the defendant came to be regarded as a *quid pro quo* for the defendant's obligation to pay for the services.

Detinue, originating from the action of debt, was the proper remedy for recovering property of the plaintiff which the defendant unlawfully detained. The plaintiff may have loaned the property to the defendant, may have bailed it to him for a special purpose, or may have placed it in his possession for repairs. In any case, if the defendant, upon demand, refused to return the property when he should have, his conduct was a wrong against the plaintiff, and the plaintiff by use of this writ could recover his property.

These were the leading remedies of a contractual nature which were available to the suitor at the close of the twelfth century and for some time thereafter. By covenant, he could recover damages for a promise of an executory character. But the action was not available unless the promise were formally made under seal. By the writ of account, he could compel one to account for money which the latter had received for the former. By the writ of detinue, he could recover property of his which another wrongfully detained. By the writ of debt, he could recover upon a common law specialty, where the defendant had under seal admitted the existence of a debt owing to the plaintiff. Also by the writ of debt, the suitor could recover a sum certain of money if he could establish that he had given the other a *quid pro quo* for the debt. But it will be observed that simple, executory promises, which are now the bases of the bulk of our enforcible contractual obligations, were outside the pale of the jurisdiction of the king's courts.

Presumably, the enforcible obligations, which have been considered, met the needs of England as it existed at the close of the twelfth century and during the early part of the thirteenth. But as early as the thirteenth century, there were forces operating to break down the manorial organization in England. As it disappeared during the succeeding centuries, towns and trading centers began to spring up. Agriculture ceased to be the sole occupation of the people, sheep raising and the woolen industry began gradually to appear. Organization of workers in specialized lines were being formed. Local self-sufficiency no longer characterized the internal organization

of England. Production, formerly for local consumption, now expanded. Specialization was a logical and necessary result of what was taking place. Trading, locally, between towns, and even more widely, began to increase rapidly. Transactions of a kind never known or required in the strict manorial economy appeared. The old formal and ceremonious modes of creating legal relations between parties were entirely unsuited to these new transactions. The remedies of the king's courts relating to the present exchange of tangible objects and recovery of the plaintiff's property wrongfully detained were not sufficient for the new order. Men now must, of necessity, when producing for the future, plan for the future. These plans must include the future conduct of others and can no longer be limited to dealings with present, tangible objects.

With the commercial and industrial development of England during the thirteenth, fourteenth, and fifteenth centuries, it cannot be doubted that the business men of the times were proceeding with their various activities, making their plans for the future, entering into arrangements of one kind and another, based upon the future conduct of each other. It is inconceivable to think that their business could have been transacted by relying solely on the kinds of arrangements which were then recognized in the king's courts. What was happening then, has happened over and over again since, and will happen again under similar circumstances in the future—business men were beginning to rely upon extra-legal force and non-legal institutions for the development and enforcement of obligations best suited to their times and immediate needs.

The pressure for the enforcibility of simple promises was becoming so insistent during this period that the ecclesiastical courts, courts Christian, were beginning to assume jurisdiction over them. It was the theory that the church courts should have jurisdiction only in spiritual matters. But here was an opportunity to secure a large and lucrative business, which was being contemned by the king's courts; and it was not difficult for the churchmen to find that a failure to perform a promise, where one had pledged his faith, and sometimes even his God, was a sin punishable by censure and excommunication. Moreover, it was an easy matter for men so to frame their agreements that they could be enforced by the church courts. The king's courts were naturally jealous of the jurisdiction which the ecclesiastical courts were, by subterfuge, assuming over temporal matters. "Within these 20 years," said BEREFORD, J. in 1303, "people

have been accustomed to take bonds binding debtors to submit to the decision of the Holy Church in mercantile matters, and by these obligations they used to draw to the Church pleas of debt; and it was seen that it was against the law, and it was ordained that they should no longer intermeddle with those kinds of pleas."[1] By statute, royal edict, and the writ of prohibition, the church courts were constantly forbidden to entertain any kind of jurisdiction which would conflict in any way with the jurisdiction of the king's courts. But "the ecclesiastical courts were persistent. As late as 1460 all the judges in the Exchequer Chamber found it necessary to restate formally the rule that *laesio fidei*, breach of faith, could not be made the means to give these courts a general jurisdiction over contracts."[2]

Moreover, the growing demand for the enforcibility of simple promissory statements was beginning to find an outlet in the courts of equity prior to 1500. These courts were new, full of youthful vigor, and much more ready and willing to mould their remedies to suit the demands and needs of the new order than the king's courts. Suitors began to go before the chancellor and ask for relief on promises where the common law courts afforded none. There are many instances, showing that the chancellor, under such circumstances, prior to 1500, did give relief.[3] "The attitude of the chancellor served as an admonition to the law judges that they must go in and occupy the field covered by the simple promise, otherwise the court of equity would take jurisdiction upon itself. The uneasiness felt by the law judges was voiced by FAIRFAX, J., in 1481, who insisted that the action on the case should be extended so as to obviate the necessity of suitors going into chancery."[4]

The king's courts were jealous of the other tribunals to which appeals were being made for the enforcibility of simple executory or future promises. They wanted the lucrative fees which accompanied an increase in litigation. But it is apparent that had not the common law courts devised ways and means of enforcing these promises the business would have passed into other hands. It now

[1] Y. B. 31, Edward I, R. S., 492; quoted in II Holdsworth, *History of the English Law*, p 252.

[2] II Holdsworth, *A History of the English Law*, p. 252.

[3] Ames, *The History of Assumpsit*, 2 H. L. R., pp. 14–15; Holmes, *Early English Equity*, 1 L. Q. R., pp. 172–73.

[4] II Street, *Foundations of Legal Liability*, pp. 34–35.

becomes necessary to trace the interesting history of the manner in which the desired results were obtained. The change came about slowly, almost unconsciously, and in a most curious and roundabout way.

In order to appreciate fully this development, we shall have to turn back to the thirteenth century and, curiously enough, examine the writs which had been developed for redressing wrongs of a personal character. At this time, we find fully developed the writs of trespass and deceit. But, as will be pointed out in a moment, they did not cover the whole field of possible personal injury. New writs might have been devised to cover the cases where there was no remedy, according to our modern notions, but a period of rigidity in the development of the law had set in, the chancellor would devise no new writs, and, unless the plaintiff could fit his facts into one of the writs which the chancellor had available for issue, he went away without remedy. The protests against this state of affairs became so insistent that Parliament came to the rescue of suitors in the passage of the famous Statute of Westminster II in 1285. This provided that "whensoever from henceforth it shall fortune in the Chancery, that in one case a writ is found, and in like case falling under like law, and requiring like remedy, is found none, the clerks of the Chancery shall agree in making a writ."[1]

By virtue of this statute, and on the existing writs, were built new writs which came to be collectively known as actions on the *case*, the name being suggested by the wording of the Statute of Westminster II.

The first of the old writs to be extended or built upon was the writ of trespass. This writ was, in the beginning, criminal in character, and was primarily designed, in its creation, to protect possession and preserve the king's peace. In the use of this writ the plaintiff would allege that the defendant "*vi et armis*," with force and arms, had violated the possession of the body, land, or goods of the plaintiff "*contra pacem domini regem*," against the peace of the king, to the damage of the plaintiff and against his will. The writ covered only cases of direct injury, and those who had suffered indirect injuries were without remedy. Moreover, if the plaintiff had requested the defendant to do some act, and the defendant did it so badly that the plaintiff suffered damage, the writ would not lie, because the indispensable element of force against the plaintiff's will was negatived

[1] Quoted in Jenks, *A Short History of the English Law*, p. 137.

by an implication in the request to perform the act. To cover these situations the writ of trespass on the case began to be allowed. To rebut the implication that the plaintiff by his request had assumed the risk of injury, in the new action it was necessary to allege an assumption of this risk by the defendant. At first, the action was available only against classes of persons, like innkeepers, common carriers, and surgeons, who, by their very calling, were deemed to assume generally a certain degree of skill in their occupations. Under this general assumption the defendant who did a job badly at the request of the plaintiff became liable for his malfeasance in an action of trespass on the case. By the middle of the fifteenth century trespass on the case had been extended to cover cases of malfeasance of persons who were not deemed by law, because of their occupations, to have assumed generally skill in their occupations. But in such cases it became necessary for the plaintiff to allege that he "specially assumed" to do the act requested, well and skilfully. From the necessity of pleading a general or special assumption in such cases, there developed the actions of *assumpsit, general* and *special.*

What light does the discussion thus far throw upon the development of the doctrine of the enforcibility of promises? In reality the courts are, at this stage, indirectly, at least, holding the defendant liable for damages flowing from a breach of a simple executory promise. But even so, uppermost in the mind of the court is the physical damage to the plaintiff, and not the failure of the defendant to do well what he had undertaken to do.

The next extension under the Statute of Westminster II occurred in the old writ of deceit. This writ was highly technical and practically was available to a suitor only when he had suffered damages by reason of the defendant's deceit in proceedings in the king's court.[1] About 1430 the plaintiff brought an action in deceit, alleging that he had employed the defendant to purchase for him a manor from X; and that the defendant intending to defraud him, purchased the manor for Y to his damage. All the judges were agreed that the action was well brought. COTESWORTH, J., said: "I say that matter lying wholly in covenant may by matter *ex post facto* be converted into deceit. When he (defendant) becomes counsel for another, that is a deceit, and changes all that was before only covenant, for which deceit he shall have an action on his case."[2]

[1] Jenks, *A Short History of the English Law*, p. 139.

[2] Ames, *The History of Assumpsit*, 2 H. L. R., p. 12.

In 1442 the plaintiff brought a bill of deceit in the king's court, alleging that for 100 pounds in hand paid, the defendant had agreed to sell him Blackacre, and that then he had sold the land to another, whereby the plaintiff was deceived and damaged. A majority of the judges were of the opinion that the plaintiff should have his remedy in deceit.

Now in both of the foregoing cases it is pretty clear, according to our present notions of right and wrong, that the plaintiffs had suffered damages by reason of the conduct of the defendants. But it is not physical damage to the person or property of the plaintiff which had previously characterized these actions in the king's courts. Moreover, the two cases represent borderland cases between *misfeasance* and *nonfeasance*. In the first case, it was not so difficult for the judges to see in the conduct of the defendant a *misfeasance* similar to the kind which before had been the basis of relief. But this could not be so easily seen in the second case. If the defendant's promise to convey Blackacre was not binding upon him, would his failure to convey, a pure *nonfeasance*, have rendered him liable to the plaintiff? If not, what difference can it make to the plaintiff that the defendant has conveyed the land to another? The judges, either failing to see that it really made no difference whether defendant refused to convey or conveyed to another, or seizing upon this incidental and immaterial fact as an excuse, established the precedent that if the plaintiff parted with his money or property in reliance upon the promise of the defendant to convey, that he might have his damages against the defendant in case the defendant conveyed to another.

Having taken this step, unconsciously or intentionally, it was not difficult for the judges to take the next step, that if the plaintiff parted with his money or property in reliance upon the defendant's promise to convey, he might have his remedy against the defendant for a refusal to convey—a pure *nonfeasance*. In 1504, this was openly recognized, the court saying, "the gist of the action being the deceit in breaking a promise on the faith of which the plaintiff had been induced to part with his money or property, it was obviously immaterial whether the defendant or a third person got the benefit of what the plaintiff gave up."[1]

The essence of the new liability is a detriment or loss sustained by the promisee in reliance on the promise. The declaration in assumpsit proves its origin, "yet the said J. S. not regarding his said

[1] I Williston's *Cases on Contracts*, p. 150.

promise, but contriving and fraudulently intending, craftily and subtly to deceive and defraud the plaintiff, refuses to pay the said sum." This detriment or loss sustained by the promisee came in time to be regarded as one of the tests, if not the sole test, of the enforcibility of simple promises.

There was yet another step to be taken in this direction by the courts before the doctrine of the enforcibility of promises was rounded out. Thus far it has been established that if a person parts with his money or property in reliance upon a promise, he shall have his remedy for the non-performance of it. But men will need to make arrangements when, at the time of the making of them, they will not desire, or be in a position, to hand over the money or property for the other's promise. Suppose, for instance, that A promises B that he will pay him 100 pounds for B's promise to convey Blackacre to the former. In this case A has not parted with his money or property; he has simply given a promise to do so at some future date. Yet, in a country rapidly growing commercial, there was need for the enforcibility of just such promises. In about 1550, the courts took this step and said that if A had since performed or had offered to perform his promise, he might have his action against B for his failure to perform his promise. "Its validity was then placed on the ground that one promise is a good consideration for another. 'A promise against a promise,' it was said, 'will maintain an action.' Since that day it has been customary in declaring on bilateral contracts, to lay one promise as having been made in consideration of the other."[1]

Thus from delictal actions and obligations there sprang the doctrine of the enforcibility of promises. But this development did not comprehend all promises. Gratuitous promises still lay without the jurisdiction of the courts, as indeed, they do at the present time. The promisee had to show that he had sustained some loss or detriment in reliance upon the promise, or had given a promise in exchange for it, before the promisor's undertaking would be enforced by the courts.

So unconsciously and unobtrusively had this development taken place that so late as 1765, Lord Mansfield thought that all promises would be enforcible without more if the parties but reduced them to writing.[2] This was in reality an attempt on the part of Lord Mansfield to introduce a formal element into the law of contract as opposed

[1] II Street, *Foundations of Legal Liability*, p. 55.

[2] *Pillans* v. *Van Mierrop*, 3 Burrows, 1664.

to enforcible promises based upon the intention of the parties. But as one writer said, "when Lord Mansfield and his fellow judges, in 1765, favored the written agreement as another kind of formal contract, they were speaking to a deaf world. The need for any extension of contractual liability had passed."[1]

It is now necessary to turn aside and see what was happening in an allied field of enforcible obligations. It will be remembered that when one person gave to another a *quid pro quo*, the law created an obligation on the part of the latter known as debt, enforcible in an action of the same name. As time went on, however, creditors found this action more and more unsuited to their needs in the collection of debt-obligations. In the first place, the creditor had to allege his debt with extreme and burdensome particularity. If he were unable to state the exact amount of his debt, he lost his debt. In the second place, the debtor under certain circumstances might "wage his law." This meant that he might escape the obligation altogether if he took an oath, supported by oaths of eleven of his neighbors or compurgators, that he did not owe the debt.

Moved by natural desires to escape the inconveniences and hardships incidental to the action of debt, creditors began to exert great pressure on the courts to give them more adequate remedies. In response to this pressure, soon after the opening of the seventeenth century, the courts permitted the obligation of debt to be swallowed up in the action of assumpsit. At first, the creditor stated in his declaration that the defendant "being indebted (*indebitatus*), to him in a certain sum, promised (*assumpsit*), to pay the said sum," and then the plaintiff averred the breach of the promise to pay. If the plaintiff was able to prove a debt and a subsequent promise to pay the debt, he was permitted to recover. This was the origin of the declaration in *indebitatus assumpsit*. At this point in its development, the declaration accurately described the transaction.

But debtors became wary and were not easily induced to make this new promise to pay the pre-existing debt by which they lost the benefit of their wager of law. Creditors, however, became more insistent and exerted still more pressure on the courts. They would have a new remedy, new promise or no new promise. The inevitable happened in *Slade's Case* in 1602, when "all the justices of England surrendered" by resolving that "every contract executory imports in itself an assumpsit." The plaintiff still alleged that the defendant,

[1] II Street, *Foundations of Legal Liability*, p. 57.

being indebted, promised to pay. But now the allegation is only partially true: the existence of the debt had to be shown but the promise to pay became a fiction in the pleading and could not be denied by the debtor. In this way creditors were given a new remedy stripped of the burdens of the old.

It should be noted that the courts here did not create a new obligation. They simply extended a more enlightened remedy so that an old, well-recognized obligation could be more adequately enforced.

Thus simple promises became enforcible in response to the growing needs of an industrial society. In the development of the purely assumptual obligations, loss or detriment by the promisee became the test of liability of the promisor. In the development of the debt obligation, a benefit, called the *quid pro quo*, to the obligor became the basis of liability. These two concepts, benefit and detriment, have survived in the law and are still considered bases of liability in contract. Whether one or the other is the exclusive test, or whether either is an exclusive test, of the enforcibility of simple promises, are still open and debatable questions.

D

Contracts are variously classified, depending on the legal aspects of the obligation which are to be brought into emphasis. They are, for instance, divided, into formal and simple contracts. In this classification, emphasis is placed on the character of the act by which the obligation is brought into existence. A formal contract derives its binding quality from the formality with which it is created. It is sometimes said that a formal contract is binding because a consideration is implied from the formality of its execution, or that a seal imports a consideration. This is not true and the fallacy of it is obvious if one but remembers that sealed obligations were enforcible long before the doctrine of consideration was known to the law. All promises made under seal were at common law enforcible because of the formal document evidencing the promise. In fact, so much importance was attached to the formality of its execution that the very instrument itself came to be regarded as the obligation. A sealed obligation may take the form of a bond, a charter, a covenant, or a deed. These various sealed instruments are collectively designated as common law specialties.

Bills of exchange, promissory notes, checks, and other negotiable obligations are frequently called formal contracts. The peculiar and unusual rights and duties of the parties to negotiable instruments are dependent entirely on the form in which the promises are expressed. In this sense, they may be called formal contracts. Since, however, the peculiar legal consequences attaching to them had their origin in the "custom of merchants," it has become usual to classify negotiable instruments as mercantile specialties.

All other contracts are simple. They are sometimes called parole contracts. But this does not mean that all simple contracts are by word of mouth. Contracts, not under seal and not in the form of negotiable instruments, are simple whether they are by word of mouth or whether they are in writing.

Contracts are also classified as executed and executory. This classification turns on the state of performance of the obligation arising under the contract. If nothing has been done by either party to a contract, by which mutual obligations have been assumed, the contract is said to be executory. If one party has performed his obligation under the contract, and the other has not, the contract is executed as to the former and executory as to the latter. If all obligations of the contract have been performed by both parties, the contract is said to be executed. This really means that there is no longer a contract because whatever contract there was has disappeared in its performance. But the term is in common usage and, if understood, can do harm.

Again, contracts are said to be express or implied. Emphasis is here laid on the mode of proving the making of the agreement. An express contract, as the names indicates, is one in the making of which the parties have expressly agreed on all the terms of the agreement and have left nothing to inference and implication. On the other hand, an implied contract is one in the making of which the parties have not expressed in so many words the terms of their agreement. In this event, the intention to contract and the terms of the agreement must be found, inferred or implied from all the circumstances under which the transaction took place. Fundamentally, the obligations are the same and differ only in the manner in which they are proved.

Contracts are said also to be void or voidable. This classification refers primarily to the agreement underlying the contract and not to the contract itself. A contract which the law refuses for any

reason to enforce is said to be void. As a matter of fact, if the law refuses to enforce it, it is simply an unenforcible agreement and never was a contract. Other agreements may be defective for one reason or another. A contract of an infant is an example. The law gives to his contract in favor of adults only partial enforcibility. The infant has the power to avoid its enforcibility if he desires. A transaction of this kind may properly be called a voidable agreement or a voidable contract. To other agreements the law attaches full legal consequences and gives to them the absolute quality of enforcibility. An agreement of this kind is the normal contract.

Finally, contracts are said to be unilateral or bilateral. The obligation of a contract is said to be bilateral when both parties have duties to perform under it. A promises to serve B in consideration of B's promise to pay him compensation for his services. Before either has completed performance of his promise, the obligation of the contract is bilateral. There are duties on each side to be performed. If, however, A has completely performed and if B has not compensated him, then the obligations of the contract is unilateral, because there is a duty on one side only.

The offer, one of the preliminary steps in the formation of a contract, is also said to be unilateral or bilateral. If a person offers a promise for a promise, each party is bound to the other upon the acceptance of the offer by the offeree. In this transaction the offer is bilateral because its acceptance creates duties on each side. If an act is offered for a promise, or a promise for an act, neither is bound until the act is performed. In this situation the actor never becomes bound and the promissor not until the act is performed. This offer is said to be unilateral because its acceptance, that is, the doing of the act, creates a duty on one side only.

QUESTIONS

1. What is meant when it is said that the Law of Contracts is at the foundation, if not the foundation itself, of our present industrial society?
2. Was there a law of contracts in early medieval society in England? Was it comparable in any degree to our present law of contracts?
3. What is the purpose of a law of contracts? With what does the law of contracts primarily deal?
4. Define a promise. Compare it with a fraudulent representation; with a representation which gives rise to an estoppel; with a condition.
5. What are the elements of fraud? What are the legal consequences of fraud?

6. What are the elements of an estoppel? What is the difference between fraud and estoppel? What are the legal consequences of estoppel?
7. What are the legal consequences of an innocent misrepresentation of fact?
8. D executes a note, promising to pay his niece $2,000, so that she will not have to work. She leaves her employment in reliance on the promise, although not required to do so by it. The niece sues D on the note. What decision?
9. What is meant by a condition in a contract? How does a condition operate?
10. What obligations were enforcible in early English law? How were these obligations created? In what actions were they enforced?
11. How do you account for the kind of obligations which existed at this time in the English law? How did dissatisfaction with them begin to manifest itself?
12. Trace the development of the action of assumpsit.
13. Show how the action of debt became obsolete. Why did it become obsolete? What action took its place?
14. What is the difference between a formal and a simple contract?
15. It is sometimes said that a promise under seal is binding because a seal imports a consideration. What is meant by this statement? Do you agree with it?
16. What is meant by a common law specialty? By a mercantile specialty?
17. Examine the statutes of some state in which you are interested and make a brief digest of all provisions relating to sealed instruments.
18. D goes into P's grocery store, where he is well known, and with P's knowledge carries away a ham. What are P's rights against D?
19. P furnishes board and lodging to D, a stranger, for two months. P expects compensation from D but says nothing about it. What are the rights of P, if any, against D?
20. P supports D, his aged parent. Nothing is said about compensation for P's care and support. What are P's rights, if any, against D?
21. P delivers coal to D, without D's request. D knows that the coal comes from P and that P expects payment for it. D uses the coal. What are P's rights against D?
22. P paints D's barn without the knowledge of D. D continues to use the barn after it is painted. What are P's rights against D?
23. What is a void contract? A voidable contract? What is meant by a defective contract?
24. What is a bilateral obligation? A unilateral obligation? What is a bilateral offer? A unilateral offer?

2. The Formation of the Agreement

a) The Offer

THE SATANITA

Law Reports 1895 Probate Reports 248 (1895)

Action of damage by collision. The "Valkyrie" and the "Satanita" were manoeuvring to get into position for starting a fifty mile race at the Mudhook Yacht Club regatta, when the "Satanita" ran into and sank the "Valkyrie."

The entry of the "Satanita" for the regatta contained this clause: "I undertake that, while sailing under this entry, I will obey and be bound by the sailing rules of the Yacht Racing Association and the by-laws of the club."

Among the rules was the following: Rule 24: "If a yacht in consequence of her neglect of any of these rules, shall foul another yacht she shall forfeit all claim to the prize, and shall pay all damages."

LORD ESHER, M. R. This is an action by the owner of a yacht against the owner of another yacht, and, although brought in the Admiralty Division, the contention really is that the yacht which is sued had broken the rules which by her consent governed her sailing in a regatta in which she was contesting for a prize.

The first question raised is whether, supposing her to have broken a rule, she can be sued for that breach of the rules by the owner of the competing yacht which has been damaged; in other words, Was there any contract between the owners of those two yachts? Or it may be put thus: Did the owner of the yacht which is sued enter into any obligation to the owner of the other yacht, that if his yacht broke the rules, and thereby injured the other yacht, he would pay damages? It seems clear that he did; and the way that he has undertaken that obligation is this: A certain number of gentlemen formed themselves into a committee and proposed to give prizes for matches sailed between yachts at a certain place on a certain day, and they promulgated rules, and said: "If you want to sail in any of our matches for our prize, you can not do so unless you submit yourselves to the conditions which we have thus laid down. And one of the conditions is that if you do sail for one of such prizes you must enter into an obligation with the owners of the yachts who are competing which they at the same time enter into similarly with you, that if by a breach of any of our rules you do damage or injury to the owner of a

competing yacht you shall be liable to make good the damage which you have so done." If that is so, then when they do sail, and not till then, that relation is immediately formed between the yacht owners. There are other conditions with regards to these matches which constitute a relation between each of the yacht owners who enters his yacht and sails it and the committee; but that does not in the least do away with what the yacht owner has undertaken, namely, to enter into a relation with the other yacht owners, that relation containing an obligation.

Here the defendant, the owner of the "Satanita," entered into a relation with the plaintiff Lord Dunraven, when he sailed his yacht against Lord Dunraven's yacht, and that relation contained an obligation that, if by any breach of any of these rules, he did cause damage to the yacht of Lord Dunraven, he would have to pay the damage.

QUESTIONS

1. What was the issue under consideration in this case? How was it decided? What rule of law can be deduced from the decision?
2. Was there an offer in the principal case? If so, how was it made? Was there an acceptance of the offer? If so, how was it made?
3. It is sometimes said that there must always be an offer and an acceptance before there can be a contract. Do you agree with this statement?
4. What is the difference between a contract and an agreement? Is every agreement a contract? Is there an agreement in every contract?
5. In what way is an agreement reached between parties?
6. D says to P: "If you will agree to meet me at State and Madison this evening at six o'clock, I will take you to dinner and to a theater afterward." P says: "I shall surely meet you there." D fails to meet P at the time and place appointed. P sues D for damages. What decision?
7. D says to P: "I will give you $50 if X is elected president of the United States at the coming election, if you will promise to pay me $50 if he is not elected." P agrees. X is elected. P sues D for $50. What decision?
8. P and D enter into an agreement which both know at the time is physically impossible of performance. P sues D on the latter's promise. What decision?

HIGGINS *v.* LESSIG

49 Illinois Appellate Reports 459 (1893)

CARTWRIGHT, J. Appellant was the owner of a set of old double harness, worth perhaps $15, which was taken from his premises without his knowledge, and he offered a reward of $100 for the recovery

of the harness and the conviction of the thief. A few days afterward a boy named Wilt found part of the harness in appellee's berry patch, and appellant went with appellee to the place and brought that part of the harness into appellee's blacksmith shop. Appellant gave the boy who had found the harness a quarter of a dollar, and said he would give him a dollar to find the rest of it. Appellee claims that appellant at that time offered a reward of $100 to the one who would find out who the thief was, and that he earned the reward. This suit was brought to recover the amount so claimed as reward, and a trial resulted in a verdict and judgment for appellee for $100.

The evidence showed that the defendant was much excited on the occasion, when it is claimed that the offer was made in the shop. Plaintiff's version of the language used was that defendant said, "I will give $100 to any man who will find out who the thief is, and I will give a lawyer $100 for prosecuting him," using rough language and epithets concerning the thief. There was evidence of substantial repetitions of the statement, together with the assertion that he would not have a second-class lawyer, either, and that he would not hire a cheap lawyer, but a good lawyer. The harness had been taken by a man called Red John Smith, who had been adjudged insane, and a Mrs. Phillips told the plaintiff that she saw Smith walking by with the harness on his back, on Sunday morning, which was the time when it was taken. Plaintiff watched Smith that night and saw him hiding the collars, and the next day he waited for the return of the defendant from Galesburg, and told him that Red John Smith had the harness. A search warrant was procured, and the remainder of the harness was found.

We do not think that the language used was such as, under the circumstances, would show an intention to contract to pay a reward, and think plaintiff had no right to regard it as such. Defendant had previously offered a very liberal reward for the return of the old harness and the conviction of the thief. On this occasion he paid the boy only a trifling sum, and offered only $1 for finding the rest of the property. His further language was in the nature of an explosion of wrath against some supposed thief who had stolen the harness, and was coupled with boasting and bluster about the prosecution of the thief. It was indicative of a state of excitement so out of proportion to the supposed cause of it, that it should be regarded rather as the extravagant exclamation of an excited man than as manifesting an intention to contract.

But if we conceded that defendant's language indicated an intention to contract to pay a reward, the plaintiff, although he obtained some definite knowledge by watching Smith, was neither the discoverer nor the first informer as to the identity of the thief. The evidence was that other persons learned of facts which showed that Red John Smith had taken the harness, and told the defendant of such facts before the plaintiff did.

Judgment reversed and cause remanded.

QUESTIONS

1. What reason or reasons did the court rely upon for denying to the plaintiff the right to recover the reward which the defendant offered?
2. D, in a state of anger but externally showing no signs of it, says that he will give $200 for the apprehension of T, who stole his harness, worth about $15. P apprehends T and delivers him up to the proper authorities. He sues D for the reward. What decision?
3. P and D go through a marriage ceremony as a joke but comply with all statutory requirements for a valid marriage. P sues D for failure to support her. What decision?
4. D's son had just been killed and he himself severely wounded by X. He announced to a group of solicitous friends who had gathered at his home: "I will give $200 to any man who will apprehend X." P apprehends X and sues for the reward. What decision?
5. P owns a watch worth about $15. He offers it to D, who knows its real value, for $150. D says he will buy the watch at that price. P sues D for the price of the watch. What decision?
6. D, intending to deceive P, offers to sell the latter a horse for $250. P, reasonably believing that D is in earnest, agrees to buy the horse at that price. P sues D for his refusal to deliver the horse. D, in defense, says that he never intended to sell the horse at any price. What decision?
7. D, intending to offer the horse to P for $250, negligently says $200. P, acting in good faith, accepts the horse at $200. P sues D for breach of contract. What decision?
8. D, intending to sell his horse to P for $250, by mistake writes $200. P accepts the offer at $200. P sues D for breach of contract. What decision?

BOYERS & CO. *v.* DUKE

[1905] 2 Irish Reports, 617

Motion on behalf of the plaintiffs to set aside the verdict and judgment entered for the defendants, and enter verdict and judgment for the plaintiffs for £29 13*s*. 9*d*. and costs.

The action was brought by the plaintiffs, drapers, residing at North Earl Street, Dublin, against the defendants, linen manufacturers, carrying on business in Forfar, Scotland, claiming damages for breach of contract in not delivering 3,000 yards of canvas. The plaintiffs had on the 23d of February, 1904, written to the defendants in the following terms: "Please give us your lowest quotation for 3,000 yards of canvas, 32½ inches wide, to the enclosed sample, or near, and your shortest time for delivery, and oblige." The defendants replied on the 24th of February: "We enclose sample No. B. 3932, nearest we have to match yours, also enclosed. Lowest price 32½ inches wide, is 4⅝*d.* per yard, 36 inches measure. Delivery of 3,000 in 5–6 weeks."

The plaintiffs wrote to defendants on the 3d March: "Please get made for us 3,000 yards canvas, 32½ inches wide, as per your quotation, February 24, at 4⅝*d.* per yard; deliver same as quickly as possible. Also please quote us for same 52 inches wide for quantity of about 20,000 yards annually. As we have not had the pleasure of doing business with you before, we give you as reference Messrs. Baxter, Brothers, Dundee, Messrs. Richards, Limited, Aberdeen. Canvas No. B. 3932.—Boyers & Co."

"Also please quote us for canvas to enclosed sample 52 inches, and oblige."

The defendants, on the 7th of March, wrote to plaintiffs that they had made a clerical error in quoting 4⅝*d.* as the price should have been 6⅝*d.* Plaintiffs replied that they had sold 3,000 yards of the canvas at a small profit on defendants' quotation of February 24th, and must, under the circumstances, hold the defendants to their contract.

The plaintiffs in the present action claimed damages for breach of contract for the sale and delivery of the canvas, alleging, in alternative counts, a contract to deliver (*a*) in five to six weeks from the 24th of February; (*b*) in five to six weeks from the 3d of March; (*c*) as quickly as possible after the 3d of March.

The action was tried before Wright, J., and a common jury of the city of Dublin. The jury found, in answer to questions left to them that the offer or quotation in defendants' letter of the 24th February was made subject to acceptance within a reasonable time; that the plaintiffs accepted within a reasonable time; that the price 4⅝*d.* per yard, quoted in the defendants' letter of the 24th of February, was inserted by defendants by mistake for 6⅝*d.*, but that the plaintiffs did not know that it was inserted by mistake. By direction of the

judge, the jury found for the defendants, and judgment was given for the defendants with costs.

MADDEN, J. The defendants in this case were asked for a "quotation." Now the word "quotation" is capable of different meanings according to the connection in which it is used, but there is a common idea underlying them all, that of notation or enumeration. The things quoted may be passages in an author, the prices of specific articles, or the terms upon which work is to be done. In the case before us both parties agree that the documents before us must be read and construed, giving the words the ordinary meaning which they bear in the English language, having regard to the subject-matter to which they relate; for neither party has contended that evidence should have been taken as to the use of the word "quotation" in mercantile transactions.

A quotation might be so expressed as to amount to an offer to provide a definite article, or to do a certain work, at a defined price. But the ideas of a quotation and of an offer to sell are radically different. The difference is well illustrated by the case of *Harvey* v. *Facey* (1893 A. C. 552). There, to a telegram in these terms, "Will you sell us B. H. P.? Telegraph lowest cash price," the answer was returned, "Lowest price for B. H. P., £900." The inquirer telegraphed, "We agree to buy B. H. P. for £900 asked by you." An exceptionally strong judicial committee of the Privy Council in a judgment delivered by Lord Morris held that the statement, or quotation, of the lowest price at which a definite thing will be sold does not import an offer to sell.

The principle on which this case was decided applies with a greater force to mercantile transactions than to an application for a statement of the price of a single parcel of land. It is a matter of common knowledge that quotations of prices are scattered broadcast among possible customers. Business could not be carried on if each recipient of a priced catalogue offering a desirable article—say a rare book—at an attractive price, were in a position to create a contract of sale by writing that he would buy at the price mentioned. The catalogue has probably reached many collectors. The order of one only can be honored. Has each of the others who write for the book a right of action? Wholesale dealers have not in stock an unlimited supply of the articles the prices of which they quote to the public at large. This stock usually bears some proportion to the orders which they may reasonable expect to receive. Transactions of the kind under

consideration are intelligible and business-like, if we bear in mind the distinction between a quotation, submitted as the basis of a possible order, and an offer to sell which, if accepted creates a contract, for the breach of which damages may be recovered.

These observations seem to apply with special force to a quotation furnished by a manufacturer, in the position of the defendants, stating the terms on which he is prepared to work, as to the price and time for completion. He may receive and comply with many applications for quotations on the same day. If his reply in each case can be turned into a contract by acceptance, his looms might be burdened with an amount of work which would render it impossible for him to meet his engagements. In my opinion, a merchant, dealer, or manufacturer, by furnishing a quotation invites an offer which will be honored or not according to the exigencies of his business. A quotation based on current prices usually holds good for a limited time. But it remains a quotation, on the basis of which an offer will not be entertained after a certain date. I have arrived at this conclusion irrespective of the terms of the letter of the 3rd of March as to which I will only say that it suggests to my mind that the writer knew well that he was giving an order, not accepting an offer for sale.

Judgment affirmed.

QUESTIONS

1. What issue was under consideration in the principal case? How was it decided? What rule of law can be deduced from the decision?
2. Suppose that the court had been of the opinion that the statement of the defendant, in his letter of February 24, was an offer to sell, would the plaintiff have been entitled to recover in his action?
3. What is a quotation? What is its purpose? What is its effect? How can one tell a quotation from an offer?
4. D, a grocer, distributes circulars, pricing sugar at 20 cents a pound. P telephones that he will take 500 pounds at that price. P sues D for his refusal to sell the sugar. What decision?
5. A State Street store places a suit of clothes in its window with this notice: "This suit for $60." P goes in and says to the proprietor: "I will take that suit at $60." P sues D for his refusal to let him take the suit at $60. What decision?
6. D sends out a catalogue in which shoes of a certain grade are priced at $7.50 a pair. P writes: "I will take 300 pairs of shoes at that price." P sues D for a breach of this contract. What decision?
7. P wrote to D, asking him if he were the owner of a certain lot and the price of the lot. D replied: "The price is $1,700 and cheap at that."

P replies: "I will accept the lot at that price." P brings a bill, asking for specific performance of the contract to convey. What decision?

8. P telegraphed to D: "Will you sell us B. H. P.? Telegraph lowest cash price." D replied: "Lowest price for B. H. P. £900." P answered: "We agree to buy B. H. P. for £900 asked by you." P sues D for his refusal to sell. What decision?

9. D sends out a form letter to the salt trade: "In consequence of a rupture in the salt market, we are authorized to offer salt in car-load lots at *x* price." P, receiving one of the letters, replies that he will take nine car loads at that price. P sues D for his refusal to ship the salt ordered. What decision?

10. D, a manufacturer of a certain medical preparation, caused to be published in the newspaper the following advertisement: "One hundred pounds will be paid to any person who contracts influenza after having taken our smokeballs three times a day for two weeks according to printed directions. One thousand pounds has been deposited in the Y Bank as a guaranty of our sincerity." P sues D for one hundred pounds and proves that he had the influenza notwithstanding the fact that he took D's medicine according to directions. What decision?

11. You are the owner of a limited quantity of grapes which you wish to sell at the most advantageous prices. Draw up a form letter to your prospective customers, stating specifications in general, without making an offer.

SPENCER *v.* HARDING

Law Reports 5 Common Pleas 561 (1870)

The second count of the declaration stated that the defendants by their agents issued to the plaintiffs and other persons engaged in the wholesale trade a circular in the words and figures following, that is to say, "28 King Street, Cheapside, May 17, 1869. We are instructed to offer to the wholesale trade for sale by tender the stock in trade of Messrs. G. Eilbeck & Co. of No. 1 Milk Street, amounting as per stock book to £2503 13*s.* 1*d.*, and which will be sold at a discount in one lot. Payment to be made in cash. The stock may be viewed on the premises, No. 1 Milk Street, up to Thursday, the 20th instant, on which day, at 12 o'clock at noon precisely, the tenders will be received and opened at our offices. Should you tender and not attend the sale, please address to us sealed and inclosed, 'Tender for Eilbeck's stock.' Stock books may be had at our offices on Tuesday morning. Honey, Humphreys, & Co." And the defendants offered and undertook to sell the said stock to the highest bidder for cash, and to receive and open the tenders delivered to them or their

agents in that behalf, according to the true intent and meaning of the said circular and the plaintiffs thereupon sent to the said agents of the defendants a tender for the said goods in accordance with the said circular, and also attended the said sale at the time and place named in the said cicular; and the said tender of the plaintiffs was the highest tender received by the defendants or their agents in that behalf; and the plaintiffs were ready and willing to pay for the said goods according to the true intent and meaning of the said circular; and all conditions were performed, etc., to entitle the plaintiffs to have their said tender accepted by the defendants, and to be declared the purchasers of the said goods according to the true intent and meaning of the said circular; yet the defendants refused to accept the said tender of the plaintiffs and refused to sell the said goods to the plaintiffs, and refused to open the said tender or proceed with the sale of the said goods in accordance with their said offer and undertaking in that behalf, whereby the plaintiffs had been deprived of profit, etc.

Demurrer on the ground that the count showed no promise to accept the plaintiffs' tender or sell them the goods. Joinder.

WILLES, J. I am of the opinion that the defendants are entitled to judgment. The action is brought against persons who issued a circular offering a stock for sale by tender which turned out to be the highest, but which was not accepted. They now insist that the circular amounts to a contract or promise to sell the goods to the highest bidder, that is, in this case, to the person who should tender for them at the smallest rate of discount; and reliance is placed on the cases as to rewards offered for the discovery of an offender. In those cases, however, there never was any doubt that the advertisement amounted to a promise to pay the money to the person who first gave the information. The difficulty suggested was that it was a contract with all the world. But that, of course, was soon overruled. It was an offer to become liable to any person who before the offer should be retracted should happen to be the person to fulfill the contract of which the advertisement was an offer or tender. That is not the sort of difficulty which presents itself here. If the circular had gone on, "and we undertake to sell to the highest bidder," the reward cases would have applied and there would have been a good contract in respect to the persons. But the question is, whether there is here any offer to enter into a contract at all, or whether the circular amounts to anything more than a mere proclamation that the defendants are ready to chaffer for the sale of the goods, and to

receive offers for the purchase of them. In advertisements for tenders for buildings it is not usual to say that the contract will be given to the lowest bidder, and it is not always that the contract is made with the lowest bidder. Here there is a total absence of any words to intimate that the highest bidder is to be the purchaser. It is a mere attempt to ascertain whether an offer can be obtained within such a margin as the sellers are willing to adopt.

Judgment for the defendants.

QUESTIONS

1. The defendant demurred to the plaintiff's declaration in the principal case. What is a demurrer? What is the effect of a demurrer? Why did the defendant demur? What kind of a question was raised by the defendant's demurrer? How was it decided? What rule of law can be deduced from the decision?
2. A State Street store advertises that on a certain day it will sell all suits of clothes then in stock at $40 apiece. P goes to the store on the day in question, picks out a suit to his liking and tenders $40 to the proprietor. The proprietor refuses to accept the money and informs him that the price of the suit is $45. P sues D for damages. What decision?
3. D advertises that he will sell his horse to the highest bidder at the town pump on a certain day. P, at some expense and trouble, presents himself at the time and place appointed, ready and willing to bid on the horse.. D does not appear. P sues D for damages. What decision?
4. D puts the horse up for sale and P bids $250. While D is waiting for a higher bid, P announces his intention to withdraw his bid. D, receiving no higher bid, announces that the horse is sold to P for $250. D sues P for the price of the horse. What decision?
5. D puts the horse up for sale and P bids $250. D sells the horse to C on a bid of $225, simply because he personally dislikes P. P sues D for breach of contract. What decision?
6. C bids $225 and P bids $250. D refuses to sell to either because he considers the bids too low. Each brings an action against him for damages. What decision?
7. D advertises that he will sell his property at auction to the highest bidder "without reserve." P makes the highest bid. P sues D for his refusal to sell the property to him. What decision?
8. D offers to sell his automobile to the highest bidder. X, secretly employed by D, and P are the only bidders. The machine is sold to P for $2,500. He later discovers the part played by X in the bidding. What are his rights, if any, against D?

DONNELLY *v.* CURRIE HARDWARE COMPANY

66 New Jersey Law Reports 388 (1901)

DIXON, J. The plaintiff, being about to bid for a contract to build a music pavilion at Atlantic City, submitted the plans and specifications to the defendant for an estimate as to the price at which the latter would do the metal work required, and on March 31st, 1899, received a letter from the defendant saying that it would do the work for $2,650. Accordingly the plaintiff put in his bid for the construction of the building, and after the making of some changes, not affecting the metal work, the job was awarded to him and the contract was signed on April 5, 1899. During the next morning the plaintiff telephoned to the defendant's manager that he had signed a contract for the building, and would be prepared to sign a written contract with the defendant at four o'clock that afternoon, to which the manager answered "all right." Shortly before that hour the plaintiff telephoned to the manager that he had not had time to prepare the contract, and would sign it in the morning to which the manager again replied "all right." The next morning the plaintiff called on the manager, and the latter informed the plaintiff that the defendant would be unable to perform the work in the time agreed upon by the plaintiff, and had not room to do the work so quickly, and refused to sign the proposed contract. Afterwards the plaintiff was compelled to pay a higher price for the metal work, and brought this suit for breach of contract. On this state of facts, shown by the plaintiff's evidence, the defendant moved for a non-suit and for direction of a verdict in favor of defendant. These motions being overruled, exceptions were sealed.

The case is governed by the rule established in *Water Commissioners* v. *Brown* 3 Broom 504, 510, where JUSTICE ELMER, speaking for the Court of Errors said: "If it appears that the parties, although they have agreed on all the terms of their contract, mean to have them reduced to writing and signed before the bargain shall be considered as complete, neither party will be bound until that is done, so long as the contract remains without any acts done under it on either side." The conversations over the telephone between the plaintiff and the defendant's manager, as well as the testimony of the plaintiff himself, make it clear that a written contract was expected by both parties. Indeed, it cannot be reasonably determined that the parties have agreed upon all the matters which they would expect to have included in their bargain, for the time allowed for the beginning and completion

of the work and the mode of payment are generally provided for expressly in such arrangements, and on these points their negotiations had been silent, awaiting probably the outcome of the plaintiff's proposal for the erection of the building.

We therefore think no contract was made by the defendant, and the motions mentioned should have prevailed.

The judgment is reversed.

QUESTIONS

1. What issue was under consideration in the principal case? How was the issue decided? What rule of law can be deduced from the decision?
2. Does the court in principal case decide that all contracts must be in writing? If not, what does it decide?
3. P and D are negotiating for the purchase and sale of a horse. P says: "I want it understood that our agreement is to be in writing." D says that he has no objection to a written contract. They agree on all the terms but do not reduce them to writing. P sues D on the alleged contract. What decision?
4. P and D orally agree on the sale and purchase of a horse. P then says that he would like to have a written memorandum of their agreement. D says that he shall have it. The written memorandum is never made. P sues D on his promise. What decision?
5. On Monday, P and D agree on the terms of a contract. On Tuesday, D says that he would like to have the agreement reduced to writing. P says that it shall be done. P sues D on his promise. D by way of defense contends that the agreement was never reduced to writing as agreed. What decision?
6. You are about to enter into a contract with D. You want a contract which is enforcible only if reduced to writing. How will you proceed?
7. "Always reduce your contracts to writing: it is not safe to enter into oral contracts." Comment on this statement.

DAWKINS *v.* SAPPINGTON

26 Indiana Reports 199 (1866)

FRAZER, J. The appellant was the plaintiff below. The complaint was in two paragraphs. 1. That a horse of the defendant had been stolen, whereupon he published a hand-bill, offering a reward of $50 for the recovery of the stolen property, and that thereupon the plaintiff rescued the horse from the thief and restored him to the defendant, who refused to pay the reward. 2. That the horse of the defendant was stolen, whereupon the plaintiff recovered and returned

him to the defendant, who in consideration thereof, promised to pay $50 to the plaintiff, which he has failed and refused to do.

To the second paragraph a demurrer was sustained. To the first an answer was filed, the second paragraph of which alleged that the plaintiff, when he rescued the horse and returned him to the defendant, had no knowledge of the offering of the reward. The third paragraph averred that the hand-bill offering the reward was not published until after the rescue of the horse and his delivery to the defendant. The plaintiff unsuccessfully demurred to each of these paragraphs and refusing to reply the defendant had judgment.

1. Was the second paragraph of the complaint sufficient? The consideration alleged to support the promise was a voluntary service rendered for the defendant without request, and it is not shown to have been of any value. A request should have been alleged. This was necessary at common law, even in a common count for work and labor (Chitty's *Pl.* 338) though it was not always necessary to prove an express request, as it would sometimes be implied from the circumstances exhibited by the evidence.

2. It is entirely unnecessary, as to the third paragraph of the answer, to say more than that though it was highly improbable in fact, it was sufficient in law.

3. The second paragraph of the answer shows a performance of the service without the knowledge that the reward had been offered. The offer therefore did not induce the plaintiff to act. The liability to pay a reward offered seems to rest, in some cases, upon an anomalous doctrine, constituting an exception to the general rule. In *Williams* v. *Carwardine*, 4 B. & Ad. 621, there was a special finding with a general verdict for the plaintiff, that the information for which the reward was offered was not induced to be given by the offer, yet it was held by all the judges of the King's Bench then present, Denman, C. J. and Littledale, Parke and Patteson, JJ. that the plaintiff was entitled to judgment. It was put upon the ground that the offer was a general promise to any person who would give the information sought; that the plaintiff having given the information, was within the terms of the offer, and that the court could not go into the plaintiff's motives. This decision has not, we believe, been seriously questioned, and its reasoning is conclusive against the sufficiency of the defense under examination. There are some considerations of morality and public policy which strongly tend to support the judgment in the case cited. If the offer was made in good faith, why

should the defendant inquire whether the plaintiff knew that it had been made? Would the benefit to him be diminished by the discovery that the plaintiff, instead of acting from mercenary motives, had been impelled solely by a desire to prevent the larceny from being profitable to the person who had committed it? Is it not well that anyone who has an opportunity to prevent the success of a crime, may know that by doing so he not only performs a virtuous service, but also entitles himself to whatever reward has been offered therefor to the public?

The judgment is reversed, with costs and the cause remanded with directions to the court below to sustain the demurrer to the second paragraph of the answer.

QUESTIONS

1. Analyze the pleadings of the principal case and ascertain precisely what issues were before the court for determination. How were they decided? What rules of law can be deduced from the decision?
2. P, without D's knowledge or request, painted the latter's barn. P sues D for his services. What decision?
3. Just before P began to paint the barn, D thought to himself that he would give $50 to P if P would do the job. P sues D for $50. What decision?
4. D writes to P, stating that he will give him $50 to paint the barn. The letter never reached P. P, however, paints the barn because he thinks it needs painting. D has no knowledge of P's act until the work is done. P sues D for $50. What decision?
5. After P paints the barn, D promises to pay him $50. P sues D on the promise. D demurs to the declaration. What decision on the demurrer?
6. P sends an offer to D to sell the latter a horse for $250. D at the same time sends a letter to P, offering to buy the horse for $250. The letters pass each other in transit. Is there a contract between P and D?
7. D offers a reward for information leading to the arrest of X, a notorious criminal. P, knowing of the offer, gives the information, but does so to ease his conscience. P afterward sues D for the reward. What decision?
8. P gives the information, partly because he fears punishment, partly to ease his conscience, and partly because he wishes to get the reward. No one reason standing alone would have induced him to give the information. He sues for the reward. What decision?

BOSTON ICE COMPANY *v.* POTTER

123 Massachusetts Reports 28 (1877)

Contract on an account annexed, for ice sold and delivered between April 1, 1874, and April 1, 1875. Answer a general denial.

At the trial in the Superior Court, before WILKINSON, J., without a jury, the plaintiff offered evidence tending to show the delivery of the ice and its acceptance and use by the defendant from April, 1874, to April, 1875, and that the price claimed in the declaration was the market price. It appeared that the ice was delivered and used at the defendant's residence in Boston, and the amount left daily was regulated by the orders received there from the defendant's servants; that the defendant, in 1873, was supplied with ice by the plaintiff, but on account of some dissatisfaction with the manner of supply, terminated his contract with it; that the defendant then made a contract with the Citizens' Ice Company to furnish him with ice; that some time before April, 1874, the Citizens' Ice Company sold its business to the plaintiff, with the privilege of supplying ice to its customers. There was some evidence tending to show that the plaintiff gave notice of this change of business to the defendant, and informed him of its intended supply of ice to him; but this was contradicted on the part of the defendant.

The judge found that the defendant received no notice from the plaintiff until after all the ice had been delivered by it, and that there was no contract of sale between the parties to this action except what was to be implied from the delivery of the ice by the plaintiff to the defendant and its use by him; and ruled that the defendant had a right to assume that the ice in question was delivered by the Citizens' Ice Company, and that the plaintiff could not maintain this action. The plaintiff alleged exceptions.

ENDICOTT, J. To entitle the plaintiff to recover, it must show some contract with the defendant. There was no express contract, and upon the facts stated no contract is to be implied. The defendant had taken ice from the plaintiff in 1873, but on account of some dissatisfaction with the manner of supply he terminated his contract, and made a contract for his supply with the Citizens' Ice Company. The plaintiff afterward delivered ice to the defendant for one year without notifying the defendant, as the presiding judge has found, that it had bought out the business of the Citizens' Ice Company, until after the delivery and consumption of the ice.

The presiding judge has decided that the defendant had a right to assume that the ice in question was delivered by the Citizens' Ice Company, and has thereby necessarily found that the defendant's contract with that company covered the time of the delivery of the ice.

There was no privity of contract established between the plaintiff and defendant and without such privity the possession and use of the property will not support an implied assumpsit, *Hills* v. *Snell*, 104 Mass. 173, 177. And no presumption of assent can be implied from the reception and use of the ice, because the defendant had no knowledge that it was furnished by the plaintiff, but supposed that he received it under the contract made with the Citizens' Ice Company. Of this change he was entitled to be informed.

A party has a right to select and determine with whom he will contract and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract, as when he contracts with another to paint a picture, or write a book, or furnish articles of a particular kind, or when he relies upon the character or qualities of an individual, or has, as in this case, reasons why he does not wish to deal with a particular party. In all these cases, as he may contract with whom he pleases, the sufficiency of his reasons for so doing cannot be inquired into. If the defendant, before receiving the ice, or during its delivery, had received notice of the change, and that the Citizen's Ice Company could no longer perform its contract with him, it would then have been his undoubted right to have rescinded the contract and to decline to have it executed by the plaintiff. But this he was unable to do, because the plaintiff failed to inform him of that which he had a right to know. *Orcutt* v. *Nelson*, 1 Gray. 536, 542. *Winchester* v. *Howard*, 97 Mass. 303. *Hardman* v. *Booth*, 1 H. & C. 803. *Humble* v. *Hunter*, 12 Q. B. 310. *Robson* v. *Drummond*, 2 B. & Ad. 303. If he had received notice and continued to take the ice as delivered, a contract would be implied. *Mudge* v. *Oliver*, 1 Allen, 74. *Orcutt* v. *Nelson*, *ubi supra*. *Mitchell* v. *Lapage*, Holt N. P. 253.

There are two English cases very similar to the case at bar. In *Schmaling* v. *Thomlinson*, 6 Taunt., 147, a firm was employed by the defendants to transport goods to a foreign market, and transferred the entire employment to the plaintiff, who performed it without the privity of the defendants, and it was held that he could not recover compensation for his services from the defendants.

The case of *Boulton* v. *Jones*, 2 H. & N. 564, was cited by both parties at the argument. There the defendant, who had been in the habit of dealing with one Brocklehurst, sent a written order to him for goods. The plaintiff, who had on the same day bought out the business of Brocklehurst, executed the order without giving the defendant notice that the goods were supplied by him and not by Brocklehurst. And it was held that the plaintiff could not maintain an action for the price of the goods against the defendant. It is said in the case that the defendant had a right of set-off against Brocklehurst, with whom he had a running account, and that is alluded to in the opinion of Baron Bramwell, though the other judges do not mention it.

The fact that a defendant in a particular case has a claim in set-off against the original contracting party shows clearly the injustice of forcing another person upon him to execute the contract without his consent, against whom his set-off would not be available. But the actual existence of the claim in set-off cannot be a test to determine that there is no implied assumpsit or privity between the parties. Nor can the non-existence of a set-off raise an implied assumpsit. If there is such a set-off, it is sufficient to state that as a reason why the defendant should prevail; but it by no means follows that because it does not exist the plaintiff can maintain his action. The right to maintain an action can never depend upon whether the defendant has or has not a defense to it.

The implied assumpsit arises upon the dealings between the parties to the action and cannot arise upon the dealings between the defendant and the original contractor, to which the plaintiff was not a party. At the same time, the fact that the right of set-off against the original contractor could not, under any circumstances, be availed of in an action brought upon the contract by the person to whom it was transferred and who executed it shows that there is no privity between the parties in regard to the subject-matter of this action.

It is, therefore, immaterial that the defendant had no claim in set-off against the Citizen's Ice Company.

We are not called upon to determine what other remedy the plaintiff has, or what would be the rights of the rights of the parties if the ice were now in existence.

Exceptions overruled.

QUESTIONS

1. Precisely what did the court decide in the principal case? Does the result seem just to you?
2. Could the plaintiff have recovered the reasonable value of the ice in an action of quasi-contracts?
3. Was there a contract between the Citizens' Ice Company and Potter? Could the Citizens' Company have assigned this contract to the Boston Company without the consent of Potter?
4. Suppose that Potter had used the ice, knowing that it had been furnished by the Boston Company, would the decision have been the same?
5. D offers to sell a horse to X. P tells D that he accepts the offer. P sues D for the latter's refusal to sell him the horse. What decision?
6. P writes a letter to D, stating that he is X and asking for offers on flour. D knows X by reputation. He sends an offer which P accepts in the name of X. Is there a contract?
7. P goes into D's store and states that he is X. D knows X by reputation only. He makes an offer to P, thinking he is X, which P accepts. Is there a contract?
8. P hands D a document which contains the terms of an offer. D signs the document without reading it. P in no way deceives D and honestly believes that D knows the contents of the document. P sues D on the alleged contract. What decision?
9. P buys a ticket on the face of which appear the words: "Passage from X to Y." On the back of the ticket appears the following statement: "Liability of the carrier for loss or destruction of baggage is limited to $50 unless a higher valuation is placed thereon by the passenger when he buys his ticket." P's baggage, worth $125, is lost in transit through the negligence of the carrier. What decision in an action by P against the carrier?
10. At the bottom of the ticket appears the word "Over" in small letters Is P bound by the provision on the back of the ticket?

FISHER *v.* SELTZER

23 Pennsylvania State Reports 308 (1854)

This was a suit in the name of Philip Fisher, late sheriff of Lebanon County, for the use of the Lancaster Bank against John C. Seltzer. It was brought to recover from the defendant the difference between the amount of his bid, when the real estate of Jonathan Wright was up for sale, and the price it sold for at a future sale, and for costs of the sale.

In the second condition of sale, at the time the bid was made by Seltzer, it was prescribed that "no person shall retract his or her bid."

In the sixth it was described, that if the purchaser should neglect or fail to comply with the conditions, "he shall pay all costs and charges."

A special verdict was rendered, in which it was stated, that previous to bidding Seltzer had been informed of the existence of the mortgage, but that he believed the property would be sold discharged of the mortgage; that on being informed by the crier that the land would be sold subject to the mortgage, he publicly retracted his bid. Notwithstanding the retraction, the property was struck down on his bid.

There was a conditional verdict for the plaintiff, depending on the question whether Seltzer could lawfully withdraw his bid.

LEWIS, J. Mutuality is so essential to the validity of contracts not under seal, that they cannot exist without it. A bid at auction, before the hammer falls, is like an offer before acceptance. In such a case there is no contract and the bid may be withdrawn without liability or injury to anyone. The brief interval between the bid and its acceptance is the reasonable time which the law allows for inquiry, consideration, correction of mistakes, and retraction. This privilege is of vital importance in sheriffs' sales, where the rule of *caveat emptor* operates with all its vigor. It is necessary, in order that bidders may not be entrapped into liabilities never intended. Without it, prudent persons would be discouraged from attending these sales. It is the policy of the law to promote competition, and thus to produce the highest and best price which can be obtained. The interests of debtors and creditors are thus promoted. By the opposite course a creditor might occasionally gain an advantage but an innocent man would suffer unjustly, and the general result would be disastrous. A bidder at sheriff's sale has a right to withdraw his bid at any time before the property is struck down to him, and the sheriff has no authority to prescribe conditions which deprive him of that right. Where the bid is thus withdrawn before acceptance, there is no contract, and such a bidder cannot, in any sense, be regarded as a "purchaser." He is, therefore, not liable for "the costs and charges" of a second sale. Where there has been no sale, there can be no re-sale. The judgment ought not to have been in favor of the plaintiff, even for "the costs and charges" of the second sale; but as the defendant does not complain, we do not disturb it.

Judgment affirmed.

QUESTIONS

1. What is a *special verdict?* What is the rule of *caveat emptor?*
2. Why was the defendant not bound by the condition of the sale that "no person shall retract his or her bid"?
3. P and D are negotiating for the purchase and sale of a horse. P says to D: "I want it understood that if you make me an offer, you cannot revoke it without my consent." D agrees to the condition and makes an offer to P. May he withdraw his offer without the consent of P? Why or why not?
4. D says to P: "I will sell you my horse for $250." Ten minutes later D notifies P that he will not sell the horse at any price. P then states that he accepts the offer. In an action by P against D for breach of an alleged contract to sell a horse, what decision?
5. D offers to sell his automobile to P and promises to keep the offer open ten days. Five days later, D notifies P that he withdraws his offer. P replies: "You cannot withdraw your offer. I here and now accept it." What are the rights of P, if any, against D?
6. D makes an offer to P and promises under seal to keep it open for ten days. Five days later, D notifies P that he revokes the offer. What are the rights of P, if any, against D?
7. D makes an offer to P, and for $50 paid by P, promises to leave the offer open for thirty days. Before the expiration of the thirty days, D informs P that he has changed his mind and revokes his offer. P thereupon states that he accepts the offer. What decision in an action by P against D for the breach of the alleged contract?
8. D makes an offer to P and promises not to revoke it for ten days. Within the ten days, P sends a letter of acceptance, not knowing that D died on the day before he mailed the letter. P sues D's personal representative on the alleged contract. What decision?
9. In the foregoing case, D becomes insane instead of dying. What decision?
10. D makes an offer to P. P dies the day after he receives the offer. P's personal representative notifies D that he accepts the offer on behalf of P's estate. P's personal representative brings an action against D on the alleged contract. What decision?

MINNEAPOLIS & ST. LOUIS RAILWAY *v.* COLUMBUS ROLLING MILL

119 United States Reports 149 (1886)

GRAY, J. The rules of law which govern this case are well settled. As no contract is complete without the mutual assent of the parties, an offer to sell imposes no obligation until it is accepted according to its terms. So long as the offer has been neither

accepted nor rejected, the negotiation remains open, and imposes no obligation upon either party; the one may decline to accept, or the other may withdraw his offer, and either rejection or withdrawal leaves the matter as if no offer had ever been made. A proposal to accept, or an acceptance, upon terms varying from those offered is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested. The other party, having once rejected the offer, cannot afterward revive it by tendering an acceptance of it. *Eliason* v. *Henshaw*, 4 Wheat. 225; *Carr* v. *Duval*, 14 Pet. 77; *National Bank* v. *Hall*, 101 U.S. 43, 50; *Hyde* v. *Wrench*, 3 Beavan, 334; *Fox* v. *Turner*, 1 Bradwell, 153. If the offer does not limit the time for its acceptance it must be accepted within a reasonable time. If it does, it may, at any time within the limit and so long as it remains open, be accepted or rejected by the party to whom, or be withdrawn by the party by whom, it was made. *Bost. & Maine Railroad* v. *Bartlett* 3 Cush. 224; *Dickinson* v. *Dodds*, 2 Ch. D. 463.

The defendant by the letter of December 8, offered to sell to the plaintiff two thousand to five thousand tons of iron rails on certain terms specified, and added that if the offer was accepted the defendant would expect to be notified prior to December 20. This offer, while it remained open, without having been rejected by the plaintiff or revoked by the defendant, would authorize the plaintiff to take at his election any number of tons not less than two thousand nor more than five thousand, on the terms specified. The offer while unrevoked might be accepted or rejected by the plaintiff at any time before December 20. Instead of accepting the offer made, the plaintiff on December 16, by telegram and letter, referring to the defendant's letter of December 8, directed the defendant to enter an order for twelve hundred tons on the same terms. The mention in both telegram and letter, of the date and the terms of the defendant's original offer, shows that the plaintiff's order was not an independent proposal, but an answer to the defendant's offer, a qualified acceptance of that offer, varying the number of tons, and therefore in law a rejection of the offer. On December 18, the defendant by telegram declined to fulfill the plaintiff's order. The negotiation between the parties was thus closed, and the plaintiff could not afterward fall back on the defendant's original offer. The plaintiff's attempt to do so, by the telegram of December 19, was therefore ineffectual and created no rights against the defendant.

Judgment for defendant affirmed.

QUESTIONS

1. What issue was under consideration in this case? How was it decided? What rule of law can be deduced from the decision?
2. What was the effect of the plaintiff's telegram of December 16, ordering 1,200 tons of iron rails?
3. Why was the plaintiff's telegram of December 19, ineffectual as an acceptance?
4. D by letter offers to sell a lot to P for $5,000, the offer to remain open ten days. P, on receipt of the offer, replies that he will give $4,000 for the lot. Within the ten days, P sends a second letter, stating that he accepts the lot at $5,000. P brings a bill, asking for specific performance of the contract. What decision?
5. D offers his horse to P for $250. P replies: "I will give you $200 for the horse, but I want it understood that this is not to be taken as a rejection of your original offer." What is the effect of P's statement on the original offer?
6. D offers a lot to P for $1,500. P replies by letter and asks D if he will not take $1,250 for the lot. D thereupon sells the lot to X. Not knowing of the sale, P seasonably sends an acceptance on the basis of the original offer. What are P's rights, if any, against D?
7. D by letter offers to sell a lot to P for $5,000. P, in ignorance of the offer, writes to D that he will give $4,000 for the lot in question. When P receives D's offer, he immediately accepts on that basis. D, on receipt of P's offer and before the receipt of his acceptance, sells the land to X. What are the rights of P against D?
8. P offers to sell his farm to D for $5,000. D replies that he will give $4,500 for it. P immediately prepares and tenders a deed to D on the basis of $4,500. D refuses to accept the deed. P sues D for breach of contract. What decision?
9. D offers to sell his horse to P for $250. P replies by letter that he will give $200 for the horse. A few hours later, he sends a telegram accepting the horse for $250. The telegram reaches D before the letter does. Is there a contract between the parties?

LORING *v.* THE CITY OF BOSTON

7 Metcalf's Massachusetts Reports 409 (1844)

This was an action of assumpsit to recover a reward of $1,000 offered by the defendants for the apprehension and conviction of incendiaries.

At the trial before WILDE, J., the following facts were proved: On the 26th of May, 1837, this advertisement was published in the daily papers in Boston: "$500 reward. The above reward is offered for the

apprehension and conviction of any person who shall set fire to any building within the limits of the city. May 26, 1837. Samuel A. Eliot, Mayor." On May 27, 1837, the following advertisement was published in the same papers: "$1,000 Reward. The frequent and successful repetition of incendiary attempts renders it necessary that the most vigorous efforts should be made to prevent their recurrence. In addition to the other precautions, the reward heretofore offered is doubled. One thousand dollars will be paid by the city for the conviction of any person engaged in these nefarious practices. May 27, 1837. Samuel A. Eliot, Mayor." These advertisements were continued in the papers but about a week, but there was no vote of the city government, or notice by the mayor, revoking the advertisements, or limiting the time during which they should be in force. Similar rewards for the detection of incendiaries had been before offered, and paid on the conviction of the offenders; and at the time of the trial of this case, a similar reward was daily published in the newspapers.

In January, 1841, there was an extensive fire on Washington Street, when the Amory House (so called) and several others were burnt. The plaintiffs suspected that Samuel Marriott, who then boarded in Boston, was concerned in burning said buildings. Soon after the fire the said Marriott departed for New York. The plaintiffs declared to several persons their intention to pursue him and prosecute him, with the intention of gaining the reward of $1,000 which had been offered as aforesaid. They pursued said Marriott to New York, carried with them a person to identify him, arrested him, and brought him back to Boston. They then complained of him to the county attorney, obtained other witnesses, procured him to be indicted and prosecuted for setting fire to the said Amory House. And at the March term, 1841, of the Municipal Court, on the apprehension and prosecution of said Marriott, and on the evidence given and procured by the plaintiffs, he was convicted of setting fire to said house, and sentenced to ten years' confinement in the state prison.

William Barnicoat, called as a witness by the defendants, testified that he was chief engineer of the fire department in Boston in 1837, and for several years after; that alarms of fire were frequent before the said advertisement in May, 1837; but that from that time till the close of the year 1841, there were but few fires in the city.

As the only question in the case was, whether said offer of reward continued to be in force when the Amory House was burnt, the case

was taken from the jury by consent of the parties, under an agreement that the defendants should be defaulted, or the plaintiff become nonsuit, as the full court should decide.

SHAW, C. J. There is now no question of the correctness of the legal principle on which this action is founded. The offer of a reward for the detection of an offender, the recovery of property, and the like is an offer or proposal on the part of the person making it, to all persons, which any one capable of performing the service may accept at any time before it is revoked, and perform the service: and such offer on one side, and acceptance and performance of the service on the other, is a valid contract made on good consideration, which the law will enforce. That this principle applies to the offer of a reward to the public at large was settled in this Commonwealth in *Symmes* v. *Frazier*, 6 Mass. 344.

The ground of defense is that the advertisement, offering the reward of $1,000 for the detection and conviction of persons setting fire to buildings in that city, was issued almost four years before the time at which the plaintiffs arrested Marriott and prosecuted him to conviction; that this reward was so offered in reference to a special emergency in consequence of several alarming fires; that the advertisement was withdrawn and discontinued; that the recollection of it had passed away; that it was obsolete, and by most persons forgotten, and that it could not be regarded as a perpetually continuing offer on the part of the city.

We are then first to look at the terms of the advertisement to see what the offer was. It is competent to the party offering such reward to propose his own terms; and no person can entitle himself to the promised reward without a compliance with all its terms. The first advertisement offering the reward demanded in this action was published May 26, 1837, offering a reward of $500 and another on the day following, increasing it to $1,000. No time is inserted in the notice, within which the service is to be done for which the reward is claimed. It is therefore relied on as an unlimited and continuing offer.

In the first place, it is to be considered that this is not an ordinance of the city government of standing force and effect; it is an act temporary in its nature, emanating from the executive branch of the city government, done under the exigency of a special occasion indicated by its terms, and continued to be published but a short time. Although not limited in its terms, it is manifest, we think, that it

could not have been intended to be perpetual, or to last ten or twenty years or more, and therefore must have been understood to have some limit. It was insisted, in the argument, that it had no limit but the Statute of Limitations. But it is obvious that the Statute of Limitations would not operate so as to make six years from the date of offer a bar. The offer of a reward is a proposal made by one party, and does not become a contract until acted upon by the performance of the service by the other, which is the acceptance of such offer, and constitutes the agreement of minds essential to a contract. The six years, therefore, would begin to run only from the time of the service performed and the cause of action accrued, which might be ten, or twenty, or fifty years from the time of the offer, and would in fact leave the offer itself unlimited by time.

Supposing, then, that by fair implication there must be some limit to this offer and there being no limit in terms, then by a general rule of law it must be limited to a *reasonable time:* that is, the service must be done within a reasonable time after the offer made.

What is a reasonable time, when all the facts and circumstances are proved on which it depends, is a question of law. To determine it, we are first to consider the objects and purposes for which such reward is offered. The principal object obviously must be to awaken the attention of the public, to excite the vigilance and stimulate the exertions of police officers, watchmen, and citizens generally, to the detection and punishment of offenders. Possibly, too, it may operate to prevent offences, by alarming the fears of those who are under temptation to commit them, by inspiring the belief that the public is awake, that any suspicious movement is watched, and that the crime cannot be committed with impunity. To accomplish either of these objects, such offer of a reward must be notorious, known, and kept in mind by the public at large, and for that purpose the publication of the offer, if not actually continued in newspapers, and placarded at conspicuous places, must have been recent. After the lapse of years and after the publication of the offer has been long discontinued, it must be presumed to be forgotten by the public generally, and, if known at all, known only to a few individuals who may happen to meet with it in an old newspaper. The expectation of benefit then from such a promise of reward must in a great measure have ceased. Indeed, every consideration arising from the nature of the case confirms the belief that such offer of reward, for a special service of this nature, is not unlimited and perpetual in its duration, but must

be limited to some reasonable time. The difficulty is in fixing it. One circumstance (perhaps a slight one) is that the act is done by a board of officers, who themselves are annual officers. But as they act for the city, which is a permanent body, and exercise its authority for the time being, and as such a reward might be offered near the end of the year, we cannot necessarily limit it to the time for which the same board of mayor and aldermen have to serve; though it tends to make the distinction between a temporary act of one branch and a permanent act of the whole city government.

We have already alluded to the fact of the discontinuance of the advertisement, as one of some weight. It is some notice to the public that the exigency has passed for which such offer of a reward was particularly intended. And though such discontinuance is not a revocation of the offer, it proves that those who made it no longer hold it forth conspicuously as a continuing offer; and it is not reasonable to regard it as a continuing offer for any considerable term of time afterwards.

Under the circumstances of the present case, the Court are of the opinion that three years and eight months is not a reasonable time within which, or rather to the extent of which, the offer in question can be considered as a continuing offer on the part of the city. In that length of time, the exigency under which it was made having passed, it must be presumed to have been forgotten by most of the officers and citizens of the community, and cannot be presumed to have been before the public as an actuating motive to vigilance and exertion on this subject; nor could it justly and reasonably have been so understood by the plaintiffs. We are therefore of opinion that the offer of the city had ceased before the plaintiffs accepted and acted upon it as such, and that consequently no contract existed upon which this action, founded on an alleged express promise, can be maintained.

Plaintiffs nonsuit.

QUESTIONS

1. What issue was under consideration in the principal case? How was the issue decided? What rule of law can be deduced from the decision?
2. What incendiaries were in the minds of the city authorities when they made the offer in question?
3. Suppose that the plaintiffs had apprehended one of the criminals who had been guilty of burning houses in 1837, would the decision have been the same?

4. D by telegram offered to sell a consignment of perishable fruit to P. Three days after receipt of the offer, P sent an acceptance. D had disposed of all the fruit before the letter of acceptance had been sent. P sues D for breach of contract. What decision?
5. D by letter offered to sell his farm to P. Ten days after receipt of the offer, P sent a letter of acceptance. Two days before the letter of acceptance was sent, D had sold the farm to X. P sues D for breach of an alleged contract to convey a farm. What decision?
6. D by telegram offered to sell P a lot in the city of Chicago. Three days after receiving the offer, P sent a telegram of acceptance. D notified P that his letter of acceptance was too late. What are the rights of P, if any, against D?
7. D makes an offer to P, concluding with the statement that "this offer must be accepted within one hour after its receipt." Two hours after receipt of the offer, P sends an acceptance. D disregards the acceptance. P sues D for damages. What decision?
8. D makes P an offer "to be accepted immediately." How long does such an offer remain open?
9. D makes an offer to P "to remain open ten days." What happens to the offer at the end of ten days?
10. "Always place a time limit on offers that you make: an extension of time for consideration of the offer can easily be made, if the offeree is really interested and needs more time." As a general rule, does this advice seem practicable and sound? Can you imagine a situation in which such advice should not be followed?

BIGGERS *v.* OWEN

79 Georgia Reports 658 (1887)

Plaintiffs brought an action of assumpsit against defendants to recover a reward of $500, which they alleged had been offered by the defendants. The offer of reward was printed as an advertisement in a newspaper in Columbus, as follows:

"We will pay $500, the above reward, for the delivery to the sheriff of Muscogee County of the party or parties, with evidence to convict, who administered the poison in the meal which proved fatal to J. W. Biggers and J. F. Burgess and wife on the 11th of November."

(*Signed*) B. A. BIGGERS,
P. J. BIGGERS,
T. J. PEARCE.

Upon trial of the case, the jury returned a verdict in favor of the plaintiffs for the amount of the reward, $500. The defendants appealed.

BLANDFORD, J. It appeared from the evidence that when this reward was offered, the plaintiffs arrested a certain woman and delivered her to the sheriff of Muscogee County; that a committing trial was had before a justice of the peace and the woman discharged for the want of sufficient evidence to commit. The reward was then withdrawn; but McMichael, one of the plaintiffs, testifies that after it was withdrawn, Pearce told him to go on, that he would pay him what his services were worth. After this, a warrant was sued out for the same woman by Mr. Pearce. McMichael, being a bailiff in the court, executed the warrant and arrested her. She was indicted for the poisoning, was tried and convicted. The judge in the court below charged the jury that if this reward was offered, and the plaintiffs thereupon furnished evidence going to show that this woman was guilty of the crime, they were entitled to recover the amount of the reward. The court was requested to charge that if, after this reward was offered, it was withdrawn before the plaintiffs performed the services contemplated by the reward, then no recovery could be had, under the declaration in this case. The court refused to give this charge as requested, but charged to the contrary.

We think the court erred in declining to charge as requested, and in charging as he did. An offer of reward is nothing more than a proposition; it is an offer to the public and until some one complies with the terms or conditions of that offer, it may be withdrawn. This is well-settled law, as to which there can be no dispute; and counsel in this case did not contend otherwise. When this offer of reward was withdrawn, and Pearce afterwards told McMichael to go on with the case, that he would pay him for his services, Pearce did not thereby become liable to pay him the amount of this reward, but only to pay him for the value of his services. And this is not an action upon a *quantum meruit* to recover the value of such services; but is an action to recover specifically the amount of this reward, $500. There was no evidence introduced in the court below to show what the value of the services were, and the record does not distinctly show what services were performed.

The court having erred in failing to charge as requested, and in charging the jury as above set out, we consider it unnecessary to say more about the case, and therefore reverse the judgment.

Judgment reversed.

QUESTIONS

1. What rule of law can be deduced from the decision in the principal case?
2. Does the court decide that the plaintiffs are entitled to no compensation for the services which they performed?
3. Had not the plaintiffs expended considerable time and energy in identifying the culprit when this offer was withdrawn? Upon what theory were the defendants permitted to revoke this offer after the plaintiffs had all but complied with the terms of the offer?
4. What is the difference between a unilateral offer and a bilateral offer? Was the offer in the principal case unilateral or bilateral? What practical difference does it make in a given case whether an offer is one kind or the other?
5. D offers a reward to anyone who will effect X's arrest. P, in reliance on the offer, expends considerable time and money in seeking X. When he is almost ready to arrest X, he receives notice from D that the offer is withdrawn. What are P's rights, if any, against D?
6. D promises to pay P $100 in consideration of P's promise to paint the former's barn. Before P begins work, D notifies him that he has changed his mind and does not want his barn painted. P sues D for damages. What decision?
7. D tells P that he will give the latter $50 if he will paint the barn of the former. P says: "I accept your offer." Ten minutes later, before P has done anything in reliance on the offer, D notifies P not to paint the barn. P sues D for breach of a contract. What decision?
8. P makes all necessary preparation to do the work, when he receives notice from D not to paint the barn. P sues D for damages. What decision?
9. P begins the work when he receives notice from D to cease work. What are P's rights against D?
10. You are about to make an offer to D. As a practical matter, will you make a unilateral or a bilateral offer to him?
11. Draw up an offer which is clearly unilateral. Draw up an offer which is clearly bilateral.

BRAUER *v.* SHAW

168 Massachusetts Reports 198 (1897)

Two actions of contract, for the alleged breach of two contracts. The cases were tried together in the Superior Court, before LILLEY, J., who ruled, as requested by the defendants, that the plaintiffs were not entitled to recover in either action, and directed the jury to return a verdict for the defendants in each case; and the plaintiffs alleged exceptions.

HOLMES, J. We come then to the later telegrams of the same day, which are relied on as making the second contract. At half past eleven the defendants telegraphed "Subject prompt reply will let you May space fifty-two six." This was received in New York at sixteen minutes past twelve, and at twenty-eight minutes past twelve a reply was sent accepting the offer. For some reason this was not received by the defendants until twenty minutes past one. At one the defendants telegraphed revoking their offer, the message being received in New York at forty-three minutes past one. The plaintiffs held the defendants to their bargain, and both parties stand upon their rights.

There is no doubt that the reply was handed to the telegraph company promptly, and at least it would have been open to a jury to find that the plaintiffs had done all that was necessary on their part to complete the contract. If then the offer was outstanding when it was accepted, the contract was made. But the offer was outstanding. At the time when the acceptance was received, even, the revocation of the offer had not been received. It seems to us a reasonable requirement that, to disable the plaintiffs from accepting their offer, the defendants should bring home to them actual notice that it had been revoked. By their choice and act, they brought about a relation between themselves and the plaintiffs which the plaintiffs could turn into a contract by an act on their part and authorized the plaintiffs to understand and to assume that that relation existed. When the plaintiffs acted in good faith on the assumption, the defendants could not complain. Knowingly to lead a person reasonably to suppose that you offer and to offer are the same thing. (*Donnell* v. *Clinton* 145 Mass. 461, 463. *Cornish* v. *Abington*, 4 H. & N. 549.) The offer must be made before the acceptance and it does not matter whether it is made a longer or a shorter time before, if by its express or implied terms it is outstanding at the time of the acceptance. Whether much or little time has intervened it reaches forward to the moment of the acceptance, and speaks then. It would be monstrous to allow an inconsistent act of the offerer, not known or brought to the notice of the offeree, to affect the making of the contract; for instance, a sale by an agent elsewhere one minute after the principal personally has offered goods which are accepted within five minutes by the person to whom he is speaking. The principle is the same when the time is longer and the act relied on a step looking to but not yet giving notice. The contrary suggestion by WILDE, J., in *M'Culloch* v. *Eagle Ins. Co.*

1 Pick, 278, 279, is not adopted as a ground of decision, and the view which we take is that taken by the Supreme Court of the United States, and is now the settled law of England. *Tayloe* v. *Merchants' Ins. Co.* 9 How. 390, 400. *Patrick* v. *Bowman*, 149 U. S. 411, 424. *Burne* v. *Van Tienhoven*, 5 C. P. D. 344. *Stevenson* v. *McLean*, 5 Q. B. D. 346. *Henthorn* v. *Fraser* (1892), 2 Ch. 27. *Thomson* v. *James*, 18 Ct. of Sess. Cas. (2d series) 11 Langdell, Con. Sec. 180. *Drew* v. *Nunn*, 4 Q. B. D. 661, 667. *Wheat* v. *Cross*, 31 Md. 99, 103. *Kempner* v. *Cohn*, 47 Ark. 519, 527.

It is unnecessary to consider other reasons which were urged for our decision.

Exceptions sustained.

QUESTIONS

1. Precisely what does Justice Holmes decide in this case?
2. Assume that an acceptance is not operative until notice of it is received by the offeror, what does the case decide?
3. Assume that an acceptance is operative when it is properly dispatched, what does this case decide?
4. Does this case decide when an acceptance becomes operative? Does it decide when a revocation becomes operative?
5. D offers in writing to sell Blackacre to P. P seasonably accepts by letter. In the meantime, D conveys the land to X. What are P's rights, if any, against D?
6. D directs his agent to notify P of the revocation of an offer previously made to P. The agent forgets to do so. P accepts the offer. P sues D for breach of the alleged contract. What decision?
7. D, intending to revoke an offer made to P, sends a letter of revocation. The letter never reaches P. P accepts the offer. D refuses to perform his promise. P sues D for damages. What decision?
8. D sent P an offer. P sent an acceptance. An hour before the acceptance was sent, D sent a revocation. The revocation reached P before the acceptance reached D. P sues D for his refusal to perform the alleged contract. What decision?
9. D offers to sell an automobile to P. On the following day, P hears from a third person that D has sold the same machine to X. P immediately notifies D that he accepts the offer. P sues D for his refusal to sell and deliver the automobile. What decision?
10. In the foregoing case, P hears rumors that D has sold or is about to sell the machine to X. Fearing that these rumors are well founded P sends an acceptance to D. Before the acceptance reaches D, he has sold the machine to X. What are P's rights, if any, against D?

11. When does an offer become operative? Why? When does a revocation of an offer become operative? Why? When does an acceptance of an offer become operative? Why?

SHUEY *v.* THE UNITED STATES

92 United States Reports 73 (1875)

This was a petition filed in the Court of Claims to recover the sum of $15,000, being the balance alleged to be due the petitioner of the reward of $25,000 offered by the Secretary of War, on the 20th of April, 1865, for the apprehension of John H. Surratt, one of Booth's alleged accomplices in the murder of President Lincoln. The petition was dismissed, whereupon an appeal was taken to this court.

STRONG, J. We agree with the Court of Claims, that the service rendered by the plaintiff's testator was, not the apprehension of John H. Surratt, for which the War Department had offered a reward of $25,000, but giving information that lead to the arrest. These are quite distinct things, though one may have been a consequence of the other. The proclamation of the Secretary of War treated them as different; and, while, a reward of $25,000 was offered for the apprehension, the offer for information was only a "liberal reward." The findings of the Court of Claims also exhibit a clear distinction between making the arrest and giving the information that lead to it. It is found as a fact, that the arrest was not made by the claimant, though the discovery and arrest were due entirely to the disclosures made by him. The plain meaning of this is, that Surratt's apprehension was a consequence of the disclosures made. But the consequences of a man's acts are not his acts. Between the consequence and the disclosure that leads to it there may be, and in this case there were, intermediate agencies. Other persons than the claimant made the arrest, persons who were not his agents, and who themselves were entitled to the proffered reward for his arrest, if any persons were. We think, therefore, that at most the claimant is entitled to the "liberal reward" promised for the information conducing to the arrest; and that reward he had received.

But, if this were not so, the judgment given by the Court of Claims is correct. The offer of a reward for the apprehension of Surratt was revoked on the twenty-fourth day of November, 1865; and notice of the revocation was published. It is not to be doubted that the offer was revocable at any time before it was accepted, and

before anything had been done in reliance upon it. There was no contract until its terms were complied with. Like any other offer of a contract, it might, therefore, be withdrawn before rights had accrued under it; and it was withdrawn through the same channel in which it was made. The same notoriety was given to the revocation that was given to the offer; and the findings of fact do not show that any information was given the claimant, or that he did anything to entitle him to the reward offered, until five months after the offer had been withdrawn. True, it is found that then, and at all times until the arrest was actually made, he was ignorant of the withdrawal; but that is an immaterial fact. The offer of the reward not having been made to him directly, but by means of a published proclamation, he should have known that it could be revoked in the manner in which it was made.

Judgment affirmed.

QUESTIONS

1. In what court was this action brought? Why was it brought in this court?
2. What rule of law can be deduced from the decision in this case? Can you justify this rule?
3. Was the offer in this case unilateral or bilateral? What difference does it make whether it was one or the other?
4. Did not the plaintiff perform the act, entitling him to $25,000, before he was aware of its withdrawal by the War Department? If so, why did the court deny a recovery of the original reward?
5. Could the plaintiff have recovered the reward if he had accidentally performed the act asked for in ignorance of the offer?
6. It is said that the decision is sound because the offeror did all that he could do to bring notice of the revocation to persons who had relied on it. Is this a sufficient justification for the decision?
7. D publishes an offer to buy eggs in three country newspapers. How may he revoke this offer?
8. D makes an offer to the public. P hears of the offer. What kind of notice of revocation is P entitled to?
9. D makes an offer directly to P. What kind of notice of revocation is P entitled to?

RICKETTS *v.* SCOTHORN

57 Nebraska Reports 51 (1898)

SULLIVAN, J. In the District Court of Lancaster County the plaintiff, Katie Scothorn, recovered judgment against the defendant, Andrew Ricketts, as executor of the last will and testament, of John

C. Ricketts, deceased. The action was based upon a promissory note, of which the following is a copy:

"May 1, 1891. I promise to pay Katie Scothorn on demand, $2,000 to be at 6 per cent per annum.

(*Signed*) J. C. RICKETTS."

In the petition the plaintiff alleges that the consideration for the execution of the note was that she should surrender her employment as bookkeeper for Mayer Bros. and cease to work for a living. She also alleges that the note was given to induce her to abandon her occupation, and that, relying on it, and on the annual interest, as a means of support, she gave up the employment in which she was then engaged. These allegations of the petition are denied by the executor. The material facts are undisputed.

The testimony of Flodene and Mrs. Scothorn, taken together, conclusively establishes the fact that the note was not given in consideration of the plaintiff's pursuing, or agreeing to pursue, any particular line of conduct. There was no promise on the part of the plaintiff to do or refrain from doing anything. Her right to the money promised in the note was not made to depend upon an abandonment of her employment with Mayer Bros. and future abstention from like service. Mr. Ricketts made no condition, requirement, or request. He exacted no *quid pro quo*. He gave the note as a gratuity and looked for nothing in return. So far as the evidence discloses, it was his purpose to place the plaintiff in a position of independence, where she could work or remain idle as she might choose. The abandonment by Miss Scothorn of her position as bookkeeper was altogether voluntary. It was not an act done in fulfillment of any contract obligation assumed when she accepted the note. The instrument in suit being given without any valuable consideration, was nothing more than a promise to make a gift in the future of the sum of money therein named.

Under the circumstances of this case, is there an equitable estoppel which ought to preclude the defendant from alleging that the note in controversy is lacking in one of the essential elements of a valid contract? We think there is. An estoppel *in pais* is defined to be "a right arising from acts, admissions, or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged." Mr. Pomeroy has formulated the following definition: "Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded,

both at law and in equity, from asserting rights which might perhaps have otherwise existed either of property, or contract, or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of property, of contract or of remedy." 2 Pomeroy, *Equity Jurisprudence*, 804.

According to the undisputed proof, as shown by the record before us, the plaintiff was a working girl, holding her position in which she earned a salary of $10 a week. Her grandfather, desiring to put her in a position of independence, gave her the note, accompanying it with the remark that his other grandchildren did not work, and that she would not be obliged to work any longer. In effect he suggested that she might abandon her employment and rely in the future upon the bounty which he promised. He, doubtless, desired that she should give up her occupation, but whether he did or not, it is entirely certain that he contemplated such action on her part as a reasonable and probable consequence of his gift. Having intentionally influenced the plaintiff to alter her position for the worse on the faith of the note being paid when due, it would be grossly inequitable to permit the maker, or his executor, to resist payment on the ground that the promise was given without consideration. The petition charges the elements of an equitable estoppel, and the evidence conclusively establishes them. If errors intervened at the trial they could not have been prejudicial. A verdict for the defendant would be unwarranted.

The judgment is right and is affirmed.

QUESTIONS

1. Did the grandfather make an offer in the principal case to his grandchild? If not, why not? If he did make an offer, did the grandchild accept it?
2. The court said that the deceased was "equitably estopped" to deny that the note was binding. What does the court mean by this? What are the elements of estoppel? Do you find present in the facts of this case the elements of estoppel?
3. Suppose that the deceased had promised the money to the plaintiff, if she would leave, or agree to leave, the work she was then doing. Would the decision have been the same if the plaintiff in reliance on such an offer had left her work? Would the theory of the decision have been the same?
4. D says to P: "I am going to give you $5,000 when you reach twenty-one years of age." During the two remaining years of his minority, P

wastes his savings and contracts many debts in reliance on this promise. D refuses to pay the money when P reaches twenty-one. P sues D for $5,000. What decision?

5. What necessary element of an offer does this decision, expressly or by implication, require?

b) The Acceptance

ELDORADO JEWELRY CO. *v.* DARNELL

135 Iowa Reports 555 (1907)

LADD, J. The defendant signed an order for the purchase of certain jewelry, and, upon suit for the price, set up as a defense that it was procured by fraud in that plaintiff's agent had represented that the order was for goods to be sold on commission by defendant as agent, and for which he was to remit only a percentage of the proceeds, after sale, to the company, which should retain title. The evidence was such that the jury might have exonerated him from the charge of negligence in signing the order, and have found the allegations of fraud established. The agent who procured the order transmitted it to the company immediately, and it was accepted the day after given. On the next day defendant wrote the company not to send the jewelry. Four letters written by him were introduced in evidence, the last date November 9, 1904, in which he indicated his wish to avoid the order and not take the property, but in none did he charge any dishonesty in the procurement of the order, or notify the company that he elected to rescind the contract. It will thus be seen that the order has been accepted before he undertook to countermand it, and that he has never elected to rescind. Indeed, the purport of his letters was to recognize the order as valid, rather than repudiate it. So that, although the court submitted the issue as to whether there was a rescission by the defendant to the jury, there was no evidence to sustain such a finding, and the only remaining question for our consideration is whether rescission is necessary in such a case.

It is conceded that, if the order was voidable merely, as when procured by fraud, defendant had his election to rescind and refuse the goods, or accept them and recoup in damages, but if under the finding of the jury, the order was void, rescission was unnecessary to defeat plaintiff's claim. To render the order void, it must have been signed by mistake; that is, under the supposition that it was an instrument of another or different character. This would be no less

a mistake because induced by fraud. The distinction should be kept in mind for an agreement procured by fraud is voidable merely, while one signed by mistake is no agreement at all. 4 Am. & Eng. Ency. of Law (2d Ed.), 15.

Numerous cases illustrate this principle. Thus in *Stoever* v. *Weir*, 10 S. & R. 25, the defense that the signature to the single bill sued on was obtained by falsely reading it as a receipt was sustained. In *Foster* v. *McKinnon*, L. R. 4 C. P. 704, the signature was procured by representing that a promissory note was an agreement appointing the defendant an agent for the sale of a patented machine, and in sustaining the defense BYLES, J., said: "It seems plain on principle and on authority that if a blind man, or man who cannot read, or for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper, which the blind or illiterate man afterward signs, then, at least, if there be no negligence, the signature so obtained is of no force, and it is invalid, not merely on the ground of fraud where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words that he never intended to sign, and therefore in contemplation of law, never did sign the contract to which his name is appended.

In *Gibbs* v. *Linabury*, 22 Mich. 478 (7 Am. Rep. 675), a promissory note was signed under the supposition that it was a contract making the defendant an agent for the sale of a patent hay fork, and this was held such a mistake as to relieve him from liability. The same principle was approved by this court in *Douglass* v. *Matting*, 29 Iowa, 498, and in *Green* v. *Wilkie*, 98 Iowa, 74. In the latter case the defendant was induced by fraud to sign a note of $1,000 and a mortgage securing the same when he supposed that the note was for $100 and the mortgage a lease. In *Trimbly* v. *Ricard*, 130 Mass. 249, evidence was held admissible tending to show, in defense of a claim, that a written agreement stipulating that certain furniture was loaned plaintiff on a promise to pay a weekly sum for the use of the same with the privilege of buying it at a price named was induced by the fraudulent representation that he was buying the furniture at a given price, part cash and the rest in installments; the court saying: "A party who is ignorant of the contents of a given instrument from inability to read, who signs it without intending to,

and who is charged with no negligence in not ascertaining the character of it, is no more bound than if it were a forgery. There has been no intelligent assent to its terms, and it is fraud in one who with knowledge of the fact attempts to enforce it." In *McGinn* v. *Tobey*, 62 Mich. 252 (28 N.W. 818, 4 Am. St. Rep. 848) a deed signed under the supposition induced by fraud that it was a lease was adjudged void. In *Schuylkill County* v. *Copley*, 67 Pa. 386, a party signed a bond under supposition that it was a petition, and was held not liable. Enough has been said to indicate the trend of authority and to make clear the principle under consideration. As said, the jury might have found that the defendant in signing the order was not negligent as he was a man of advanced years, without his glasses, which had been broken, and could not read the instrument signed, which was long and in small type. The jury might also have found that he signed the same under a mistaken supposition that it was merely a contract under which he was to receive the goods as the property of plaintiffs, and dispose of them on commission, with the obligation to remit a percentage of the proceeds only. If so, executing the order was by a mistake, and the instrument utterly void. This must be so, for in such a case the minds of the parties have never met. Under the findings of the jury the judgment was rightly entered for the defendant.

Affirmed.

QUESTIONS

1. What was the issue presented for consideration in the principal case? How was the issue decided? What rule of law can be deduced from this decision?
2. Had the defendant ever rescinded the agreement which he entered into? If not, why was the plaintiff not permitted to recover on it?
3. Was the defendant negligent in signing the order as he did? Suppose that he had been negligent, would the decision in this case have been the same?
4. D prepares an offer and induces P, a blind man, to sign it, by a representation that it is a letter of recommendation. What is the legal effect, if any, of the instrument?
5. P carefully conceals a check under a page of paper which D is requested to sign. D, believing that he is signing a contract of agency, signs the check under the page of paper. What is the legal effect, if any, of the check?
6. D signs a paper without examining its contents. It turns out to be an acceptance of an offer which P had previously made to him. P sues D on the alleged contract. What decision?
7. What is the effect of an acceptance of an offer?

8. D says to P: "I will give you $50 if you will go to St. Louis on business for me." What kind of an offer is this? How may it be accepted? When does an acceptance of it become operative? Before P goes to St. Louis, is either bound? Does P ever become bound to do anything under such an arrangement? Does D ever become bound?
9. D says to P: "I will give you $50 if you will promise to go to St. Louis for me." What kind of an offer is this? How may it be accepted? When is it accepted? What is the effect of acceptance on D and P?
10. P, fraudulently representing that he owns a horse, promises to sell it to D for $250. D gives his check for the amount. What are the rights of D?
11. Why was the plaintiff not permitted to recover in the principal case? Was it because no contract was ever made? Or was it because there was a voidable contract which had been rescinded?

RAFFLES *v.* WICHELHAUS

2 Hurlstone and Coltman's English Reports 906 (1864)

Declaration. For that it was agreed between the plaintiff and the defendants, to wit, at Liverpool, that the plaintiff should sell to the defendant and the defendants buy of the plaintiff, certain goods, to wit, 125 bales of Surat cotton, guaranteed middling fair merchants Dhollarah, to arrive ex "Peerless" from Bombay; and that the cotton should be taken from the quay, and that the defendants would pay the plaintiff for the same at a certain rate, to wit, at the rate of 17¼ *d.* per pound, within a certain time then agreed upon after arrival of the said goods in England. Averments: that the said goods did arrive by the said ship from Bombay in England, to wit, at Liverpool, and the plaintiff was then and there ready and willing and offered to deliver the said goods to the defendants, etc. Breach: that the defendants refused to accept the said goods or pay the plaintiff for them. Plea. That the said ship mentioned in the said agreement was meant and intended by the defendants to be the ship called the "Peerless," which sailed from Bombay to wit, in October; and that the plaintiff was not ready and willing and did not offer to deliver to the defendants any bales of cotton which arrived by the last mentioned ship, but instead thereof was only ready and willing and offered to deliver to the defendants 125 bales of Surat cotton which arrived by another and different ship, which was also called the "Peerless," and which sailed from Bombay, to wit, in December.

Demurrer, and joinder therein.

MILWARD, in support of the demurrer. The contract was for the sale of a number of bales of cotton of a particular description, which the plaintiff was ready to deliver. It is immaterial by what ship the cotton was to arrive, so that it was a ship called the "Peerless." The words "to arrive ex 'Peerless' " only mean that if the vessel is lost on the voyage, the contract is to be at an end. (POLLOCK, C. B.: It would be a question for the jury whether both parties meant the same ship called the "Peerless"; but it is for the sale of cotton on board a ship of that name.) (POLLOCK, C. B. The defendant bought only that cotton which was to arrive by a particular ship. It may as well be said, that if there is a contract for the purchase of certain goods in warehouse A, that is satisfied by the delivery of goods of the same description in warehouse B.) In that case there would be goods in both warehouses; here it does not appear that the plaintiff had any goods on board the other "Peerless." (MARTIN, B.: It is imposing on the defendant a contract different from that which he entered into.) (POLLOCK, C. B.: It is like a contract for the purchase of wine coming from a particular estate in France or Spain, where there are two estates of that name.) The defendant has no right to contradict by parol evidence a written contract good upon the face of it. He does not impute misrepresentation or fraud, but only says that he fancied the ship was a different one. Intention is of no avail, unless stated at the time of the contract. (POLLOCK, C. B.: One vessel sailed in October and the other in December.) The time of sailing is no part of the contract.

MELLISH (Cohen with him), in support of the plea. There is nothing on the face of the contract to show that any particular ship called the "Peerless" was meant but the moment it appears that two ships called the "Peerless" were about to sail from Bombay there is a latent ambiguity, and parol evidence may be given for the purpose showing that the defendant meant one "Peerless" and the plaintiff another. That being so, there was no consensus *ad idem*, and therefore no binding contract. He was then stopped by the Court.

Per Curiam, POLLOCK, C. B., MARTIN, B., and PIGGOTT, B.: There must be judgment for the defendants.

Judgment for the defendants.

QUESTIONS

1. What was the issue under consideration in the principal case? How was it decided? What rule of law can be deduced from the decision?

2. Suppose that there had been only one ship by the name of "Peerless," but that the defendant thought that it arrived in October, what would have been the decision in an action by the plaintiff against the defendant?
3. Suppose that the defendant knew, but that the plaintiff did not know, that there were two ships by the same name; and that the defendant had in mind the ship due to arrive in December and that the plaintiff had in mind the ship due to arrive in October; what would have been the decision in an action by the plaintiff against the defendant?
4. Suppose that both parties knew that there were two ships by the same name, but that the plaintiff had one in mind, and that the defendant had the other in mind; what would have been the decision in an action by the plaintiff against the defendant?
5. D dictates a letter to P, offering to sell a certain lot to P for $5,500. Through an error of the typist, the amount is made $4,500 instead of $5,500. P accepts on the basis of $4,500. P sues D on the contract. D contends that he is not liable because he never intended to sell the lot for less than $5,500. What decision?
6. D intends to offer his watch to P for $50, but he mumbles his words so badly that P reasonably believes that he says $15 and accepts on that basis. P sues D for his refusal to sell the watch at that price. What decision?
7. P, intending to offer stock to D at $75 a share, by mistake offers it at $85 a share. D, in ignorance of the error, accepts the offer at the latter figure. D later discovers the mistake and refuses to accept the stock at $85 a share. P sues D for breach of the alleged contract. What decision?
8. P offers to sell D a lot on Prospect Street. P has only one lot on that street. D accepts but has in mind a lot on Prospect Street which does not belong to P. P sues D for his refusal to accept a conveyance of the lot which P actually owns. What decision?
9. P offers to sell a lot on Prospect Street to D. Neither party knows that there are two streets by that name in the city. D accepts P's offer. P had in mind one street on which he owned a lot. D had in mind the other street on which P did not own a lot. P sues D for his refusal to accept a conveyance of the lot he actually owns. What decision?

RUPLEY *v.* DAGGETT

74 Illinois Reports 351 (1874)

This was an action of replevin, brought by John F. Daggett against Abram Rupley and Jacob Rupley, to recover a mare which the defendants claimed they had bought of the plaintiff.

It appears that at the first conversation about the sale of the mare, Rupley asked the plaintiff his price, the plaintiff swearing that he replied $165, while the defendant testified that he said $65, and that he did not understand him to say $165. In the second conversation Rupley says he told Daggett, that if the mare was what he represented her to be, they would give $65, and Daggett said he would take him down next morning to see her. Daggett denied this, and says that Rupley said to him, "Did I understand you sixty-five?" Daggett states that he supposed Rupley referred to the fraction of the $100, and meant sixty-five as coupled with the price named at the previous interview. He answers, "Yes, sixty-five." Both parties, from this supposed the price was fixed, Rupley supposing it was $65, and Daggett supposing it was $165, and the only thing remaining to be done, as each thought, was for Rupley to see the mare and decide whether she suited him. The next day Rupley came, saw the mare and took her home with him. The plaintiff recovered in the court below and the defendants appealed.

SCOTT, J. It is very clear, from the evidence in this case, there was no sale of the property understandingly made. Appellee supposed he was selling for $165, and it may be appellant was equally honest in the belief that he was buying at the price of $65. There is, however, some evidence tending to show that appellant Rupley did not act with entire good faith. He was told before he removed the mare from appellee's farm, there must be some mistake as to the price he was to pay for her. There is no dispute this information was given to him. He insisted, however, the price was $65, and expressed his belief he would keep her if there was a mistake. On his way home with the mare in his possession he met appellant, but never intimated to him he had been told there might be a misunderstanding as to the price he was to pay for her. This he ought to have done, so that, if there had been a misunderstanding between them, it could be corrected at once. If the price was to be $165, he had never agreed to pay that sum, and was under no sort of obligation to keep the property at that price. It was his privilege to return it. On the contrary, appellee had never agreed to sell for $65, and could not be compelled to part with his property for a less sum than he chose to ask. It is according to natural justice, where there is a mutual mistake in regard to the price of an article of property, there is no sale, and neither party is bound. There has been no meeting of the minds of the contracting parties, and hence there can be no sale. This principle

is so elementary it needs no citation of authorities in its support. Any other rule would work injustice and might compel a person to part with his property without his consent, or to take and pay for property at a price he had never contracted to pay.

Judgment affirmed.

QUESTIONS

1. What action did the plaintiff bring in this case? What is the nature of the action? In this action, what must the plaintiff allege and prove in order to recover?
2. Did the court hold in this case that there was no contract at all or that there was a contract which could be rescinded by the plaintiff?
3. P says to D: "I will sell you my horse for $165." D asks: "Did you say $65?" "Yes," replied P. D thereupon says that he will accept the horse for $65. (*a*) P makes his first statement so indistinctly that D reasonably believes that $65 was intended as the price. (*b*) When D purported to accept, he well knew that P mentioned the fraction as a representation of the whole sum of $165. Is there a contract under either hypothesis?
4. D, by mistake, offers to sell stock to P for $500, when he intended to offer it at $1,500. (*a*) P, suspecting that a mistake has been made, accepts at $500. (*b*) P, having actual knowledge that a mistake has been made, accepts. Is there a contract in either case?
5. A railroad company makes a mistake in its schedule of rates and is selling tickets from X to Y for $7.50 when the rate should be $12.50. D, knowing of the mistake, buys a hundred tickets and is offering them for sale to the public at $10 apiece. What are the rights of the railroad company?
6. "There has been no meeting of the minds of the contracting parties and hence there can be no sale." What does the court mean here by "meeting of the minds"?

PRESCOTT *v.* JONES

69 New Hampshire Reports 305 (1898)

Assumpsit. The declaration alleged, in substance, that the defendants, as insurance agents, had insured the plaintiff's buildings in the Manchester Fire Insurance Company until February 1, 1897, that on January 23, 1897, they notified him that they would renew the policy and insure his buildings for a further term of one year from February 1, 1897, in the sum of $500, unless notified to the contrary, and believing, as he had a right to believe, that the buildings would be

insured by the defendants for one year from February 1, 1897, gave no notice to them to insure or not to insure, that they did not insure the buildings as they had agreed and did not notify him of their intention not to do so; that the buildings were destroyed by fire March 1, 1897, without fault on the plaintiff's part. The defendants demurred.

BLODGETT, J. While an offer will not mature into a complete and effectual contract until it is acceded to by the party to whom it is made and notice thereof, either actual or constructive, given to the maker (*Abbot* v. *Shepard* 48, N.H. 14, 17; *Perry* v. *Insurance Co.*, 67 N.H 291, 294, 295), it must be conceded to be within the power of the maker to prescribe a particular form or mode of acceptance; and the defendants having designated in their offer what they would recognize as notice of its acceptance, namely, failure of the plaintiff to notify them to the contrary, they may properly be held to have waived the necessity of formally communicating to them the fact of its acceptance by him.

But this did not render acceptance on his part any less necessary than it would have been if no particular form of acceptance had been prescribed, for it is well settled that "a party cannot, by the wording of his offer, turn the absence of communication of acceptance into an acceptance, and compel the recipient of his offer to refuse it at the peril of being held to have accepted it." Clark, *Cont.* 31, 32. "A person is under no obligation to do or say anything concerning a proposition which he does not choose to accept. There must be actual acceptance or there is no contract." *More* v. *Insurance Co.*, 130 N.Y. 537, 547. And to constitute acceptance, "there must be words, written or spoken, or some other overt act." Bish. *Cont.*, s. 329 and authorities cited.

If, therefore, the defendants might and did make their offer in such a way as to dispense with the communication of its acceptance to them in a formal and direct manner, they did not and could not so frame it as to render the plaintiff liable as having accepted it merely because he did not communicate his intention not to accept it. And if the plaintiff was not bound by the offer until he accepted it, the defendants could not be, because "it takes two to make a bargain," and as contracts rest on mutual promises, both parties are bound, or neither is bound.

The inquiry as to the defendant's liability for the non-performance of their offer thus becomes restricted to the question: Did the plaintiff accept the offer so that it became by his action clothed with legal

consideration and perfected with the requisite condition of mutuality? As, in morals, one who creates an expectation in another by a gratuitous promise is doubtless bound to make the expectation good, it is perhaps to be regretted that, upon the facts before us, we are constrained to answer the question in the negative. While a gratuitous undertaking is binding in honor, it does not create a legal responsibility. Whether wisely and equitably or not, the law requires a consideration for those promises which it will enforce; and as the plaintiff paid no premium for the policy which the defendants proposed to issue, nor bound himself to pay any, there was no legal consideration for their promise and the law will not enforce it.

Then again, there was no mutuality between the parties. All the plaintiff did was merely to determine in his own mind that he would accept the offer. There was nothing whatever to indicate it by way of speech or other appropriate act. Plainly this did not create any rights in his favor as against the defendants. From the very nature of a contract this must be so; and it therefore seems superfluous to add that the universal doctrine is that an uncommunicated mental determination cannot create a binding contract.

Nor is there any estoppel against the defendants, on the ground that the plaintiff relied upon their letter and believed they would insure his building as therein stated. The letter was a representation only of a present intention or purpose on their part. "It is not a statement of a fact or state of things actually existing, or past and executed, on which a party might properly be guided in his conduct. The intent of a party, however positive or fixed, concerning his future action, is necessarily uncertain as to its fulfillment, and must depend on contingencies and be subject to be changed and modified by subsequent events and circumstances. On a representation concerning such a matter no person would have a right to rely or to regulate his action in relation to any subject in which his interest was involved as upon a fixed certain, and definite fact or state of things, permanent in its nature and not liable to change. The doctrine of estoppel on the ground that it is contrary to a previous statement of a party does not apply to such a representation. The reason on which the doctrine rests is, that it would operate as a fraud if a party was allowed to aver and prove a fact to be contrary to that which he had previously stated to another for the purpose of inducing him to act and to alter his condition, to his prejudice, on the faith of such previous statement. But the reason wholly fails when the representation relates only to a

present intention or purpose of a party, because being in its nature uncertain, and liable to change, it could not properly form a basis or inducement upon which a party could reasonably adopt any fixed and permanent course of action." *Langdon* v. *Doud*, 10 Allen 433, 437; *Jackson* v. *Allen*, 120 Mass. 65, 79; *Jordan* v. *Money*, 5 H.L.C. 185.

"An estoppel cannot arise from a promise as to future action with respect to a right to be acquired upon an agreement not yet made." *Insurance Co.* v. *Mowry*, 96 U.S. 544, 547. "The doctrine has no place for application when the statement relates to rights depending upon contracts yet to be made, to which the person complaining is to be party. He has it in his power in such cases to guard against any consequences of a subsequent intention by the person with whom he is dealing." *Ibid.*, 548.

To sum it up in a few words, the case presented is, in its legal aspects one of a party seeking to reap where he had not sown and to gather where he had not scattered.

Demurrer sustained.

QUESTIONS

1. What rule of law does the principal case lay down? What reasons does the court give for the rule of law announced?
2. Did not the plaintiff do precisely what the defendant requested by way of acceptance—mentally determine to accept? If so, why was the plaintiff not entitled to recover on the policy?
3. Cannot an offeror dispense with various elements of an acceptance, if he desires? Did not the defendant by its offer agree to dispense with all elements of an acceptance except mental assent?
4. What would have been the decision in case the defendant had been suing the plaintiff for premiums on the insurance?
5. Why was not the defendant estopped to deny that it had insured the plaintiff's building?
6. May an offeror incorporate in his offer any conditions as to time, place, and mode of acceptance?
7. D says to P: "I will sell you my horse for $250, if you will agree to buy him at that price, will write out your promise on a piece of pink paper, put it under seal, and deliver it into my hands tonight at twelve o'clock." What must P do in order to accept this offer?
8. D makes a promise to P, in which he says: "Place your written acceptance in my mail box, that will conclude the matter." P does as requested but the communication never reaches D. P sues D on the alleged contract. What decision?

9. D makes an offer to P, concluding, "Write out your acceptance and keep it in your pocket. That will be a sufficient acceptance." P does as requested. Is there a contract between D and P?
10. D makes an offer to P, in which he says: "If you decide to accept, make a mark on the signboard at the crossroads. That will satisfy me." P makes the mark as requested, intending to accept the offer. Is there a contract?
11. D says to P: "I will sell you Blackacre for $5,000, if you will mentally determine to accept before tomorrow noon. That will be a sufficient acceptance for me." P mentally determines to accept within the time specified. Is there a contract?

WHITE *v.* CORLIES

46 New York Reports 467 (1871)

This was an appeal from a judgment of the General Term of the first judicial district, affirming a judgment entered upon a verdict for the plaintiff.

The action was for an alleged breach of contract and arose out of the following facts: The plaintiff was a builder, with his place of business in Fortieth Street, New York City. The defendants were merchants at 32 Dey Street. In September, 1865, the defendants furnished the plaintiff with specifications for fitting up a suite of offices at 57 Broadway and requested him to make an estimate of the cost of doing the work. On September 28, the plaintiff left his estimate with the defendants and they were to consider upon it and inform the plaintiff of their conclusions.

On the same day the defendants made a change in their specifications and sent a copy of the same, so changed, to the plaintiff for his assent under his estimate, to which he assented by signing the same and returning it to the defendants. On the following day the defendants' bookkeeper wrote the plaintiff the following note:

"New York, Sept. 29.

"Upon an agreement to finish fitting up of offices, 57 Broadway, in two weeks from date, you can begin at once. The writer will call again, probably between five and six this P. M.

"W. H. R.
"For J. W. Corlies & Co.
32 Dey Street."

No reply to this note was ever made by the plaintiff; and on the next day the same was countermanded by a second note from the defendants. Immediately upon receipt of the note of September 29, and before the countermand was forwarded, the plaintiff commenced performance by the purchase of lumber and beginning work thereon. After receiving this countermand, the plaintiff brought this action for damages for a breach of contract.

The court charged the jury as follows: "From the contents of this note which the plaintiff received, was it his duty to go down to Dey Street (meaning to give notice of assent) before commencing work? In my opinion, it was not. He had a right to act upon this note and commence the job, and that was a binding contract between the parties."

The jury returned a verdict for the plaintiff and judgment was entered thereon. The defendant appealed.

FOLGER, J. We do not think that the jury found, or that the testimony shows, that there was any agreement between the parties, before the written communication of the defendants of September 30 was received by the plaintiff. This note did not make an agreement. It was a proposition, and must have been accepted by the plaintiff before either party was bound in contract to the other. The only overt action which is claimed by the plaintiff as indicating on his part an acceptance of the offer, was the purchase of the stuff necessary for the work, and commencing work, as we understand the testimony, upon that stuff.

We understand the rule to be, that where an offer is made by one party to another when they are not together, the acceptance of it by that other must be manifested by some appropriate act. It does not need that the acceptance shall come to the knowledge of the one making the offer before he shall be bound. But though the manifestation need not be brought to this knowledge before he becomes bound, he is not bound, if that manifestation is not put in a proper way to be in the usual course of events, in some reasonable time, communicated to him. Thus a letter received by mail containing a proposal may be answered by letter by mail containing the acceptance. And in general, as soon as the answering letter is mailed, the contract is concluded. Though one party does not know of the acceptance, the manifestation thereof is put in the proper way of reaching him.

In the case in hand, the plaintiff determined to accept. But a mental determination not indicated by speech, or put in course of indication by act to the other party, is not an acceptance which will bind the other. Nor does an act, which, in itself, is no indication of an acceptance, become such, because accompanied by an unevinced mental determination. Where the act, uninterrupted by concurrent evidence of the mental purpose accompanying it, is as well referable to one state of facts as another, it is no indication to the other party of an acceptance, and does not operate to hold him to his offer.

Conceding that the testimony shows that the plaintiff did resolve to accept this offer, he did no act which indicated an acceptance of it to the defendants. He, a carpenter and builder, purchased stuff for the work. But it was stuff as fit for any other like work. He began work upon the stuff, but as he would have done for any other like work. There was nothing in his thought formed but not uttered, or in his acts that indicated or set in motion an indication to the defendants of his acceptance of their offer, or which could necessarily result therein.

But the charge of the learned judge was fairly to be understood by the jury as laying down the rule to them, that the plaintiff need not indicate to the defendants his acceptance of their offer; and that the purchase of stuff and working on it after receiving the note, made a binding contract between the parties. In this we think the learned judge fell into error.

The judgment appealed from must be reversed, and a new trial ordered, with costs to abide the event of the action.

QUESTIONS

1. What was the nature of the offer which the defendant made in this case? Was it unilateral or bilateral? What is the difference between the two?
2. Suppose that the offer in this case had been unilateral, would the decision of the court have been the same?
3. Suppose that the plaintiff had taken his materials and tools to the office and had actually begun work, would the decision in this case have been the same?
4. Did not the conduct of the plaintiff, after receiving the offer, tend to show his assent to the defendant's proposition? If so, why was there not a contract? What more, in the opinion of the court, should the plaintiff have done in order to have completed his acceptance?

5. Suppose that the defendant had said to the plaintiff: "If you will mentally determine to accept my offer, that will be sufficient." If the plaintiff had so determined, would there have been a contract?
6. Suppose that the defendant had said, "If you assent to my proposition, evidence your assent by purchasing materials with which to do the work," and that the plaintiff had purchased the materials, would there have been a contract?
7. How may one know what evidence the offeror desires of an acceptance by way of a promise?
8. P sends coal around to D's home, stating that D may have the coal at $7 a ton. D makes no reply, but uses the coal. Is there a contract?
9. P, without being solicited to do so, sends a newspaper to D. D receives and reads the paper. P sues D for a year's subscription. What decision?
10. D, a theater manager, makes an offer to P and gives her a form to fill out by way of an acceptance. She fills it out and drops it in a box in the lobby of the theater, in which communications of this kind for the defendant were usually placed. The communication never reached D. P sues D for breach of the alleged contract. What decision?

TAYLOE *v.* THE MERCHANTS' FIRE INSURANCE COMPANY

9 Howard's United States Reports 390 (1850)

NELSON, J. This is an appeal from a decree of the Circuit Court for the District of Maryland which was rendered for the defendants.

The case in the court below was this. William H. Tayloe, of Richmond County, Virginia, applied to John Minor, the agent of the defendants, residing at Fredericksburg in that state, for an insurance upon his dwelling-house to the amount of $8,000 for one year, and as he was about leaving home for the State of Alabama, desired the agent to make the application in his behalf.

The application was made accordingly, under the date of November 25, 1844, and an answer received from the secretary of the company, stating that the risk would be taken at seventy cents on the thousand dollars, the premium amounting to the sum of fifty-six dollars. The agent stated in the application to the company the reason why it had not been signed by Tayloe, that he had gone to the State of Alabama on business, and would not return till February following; and that he was desired to communicate to him at that place the answer of the company.

On receiving the answer, the agent mailed a letter directed to Tayloe, under date of the 2nd of December, advising him of the terms of the insurance, and adding, "Should you desire to effect the insurance, send me your check payable to my order for $57, and the business is concluded. The additional dollar was added for the policy."

This letter, in consequence of a misdirection, did not reach Tayloe till the 20th of the month; who, on the next day, mailed a letter in answer to the agent, expressing his assent to the terms, and inclosing his check for the premium as requested. He also desired that the policy should be deposited in the bank for safe-keeping. This letter of acceptance was received on the 31st at Fredericksburg, by the agent, who mailed a letter in answer the next day, communicating to Tayloe his refusal to carry into effect the insurance, on the ground that his acceptance came too late, the center building of the dwelling-house in the mean time, on the 22d of the month, having been consumed by fire.

The company, on being advised of the facts, confirmed the view taken of the case by their agent; and refused to issue the policy, or pay the loss.

A bill was filed in the court below by the insured against the company setting forth substantially the above facts, and praying that the defendants might be decreed to pay the loss, or such other relief as the complainant might be entitled to.

Several objections have been taken to the right of the complainant to recover, which it will be necessary to notice; but the principal one is that the contract of insurance was not complete at the time the loss happened, and therefore, that the risk proposed to be assumed had never attached.

Two positions have been taken by the counsel for the company for the purpose of establishing this ground of defense: (1) The want of notice to the agent of the company of the acceptance of the terms of the insurance; and (2) the non-payment of the premium.

The first position assumes that, where the company have made an offer through the mail to insure upon certain terms, the agreement is not consummated by the mere acceptance of the offer by the party to whom it is addressed; that the contract is still open and incomplete until the notice of acceptance is received; and that the company is at liberty to withdraw the offer at any time before the arrival of the notice; and this even without communicating notice of the withdrawal to the applicant; in other words, that the assent of

the company, express or implied, after the acceptance of the terms proposed by the insured, is essential to a consummation of the contract.

The effect of this construction is to leave the property of the insured uncovered until his acceptance of the offer has reached the company and has received their assent; for if the contract is incomplete until notice of the acceptance, till then the company may retract the offer, as neither party is bound until the negotiation has resulted in a complete bargain between the parties.

In our apprehension, this view of the transaction is not in accordance with the usages and practice of those companies in taking risks; nor with the understanding of merchants and other business men dealing with them; nor with the principles of law, settled in analogous cases, governing contracts entered into by correspondence between parties residing at a distance.

On the contrary, we are of opinion that an offer under the circumstances stated, prescribing the terms of insurance, is intended, and is to be deemed, a valid undertaking on the part of the company, that they will be bound, according to the terms tendered, if an answer is transmitted in due course of mail, accepting them; and that it cannot be withdrawn, unless the withdrawal reaches the party to whom it is addressed before his letter of reply announcing the acceptance has been transmitted.

This view of the effect of the correspondence seems to us to be but carrying out the intent of the parties, as plainly manifested by their acts and declarations.

On the acceptance of the terms proposed, transmitted by due course of mail to the company, the minds of both parties have met on this subject, in the mode contemplated at the time of entering upon the negotiation, and the contract becomes complete. The party to whom the proposal is addressed has a right to regard it as intended as a continuing offer until it shall have reached him, and shall be in due time accepted or rejected.

Such is the plain import of the offer. And besides, upon any other view, the proposal amounts to nothing, as the acceptance would be but the adoption of the terms tendered, to be, in turn, proposed by the applicant to the company for their approval or rejection. For, if the contract is still open until the company is advised of an acceptance, it follows, of course, that the acceptance may be repudiated at any time before the notice is received. Nothing is effectually accomplished by an act of acceptance.

It is apparent, therefore, that such an interpretation of the acts of the parties would defeat the object which both had in view in entering upon the correspondence.

The fallacy of the argument, in our judgment, consists in the assumption that the contract cannot be consummated without a knowledge on the part of the company that the offer has been accepted. This is the point of the objection. But a little reflection will show that in all cases of contracts entered into between parties at a distance by correspondence it is impossible that both should have a knowledge of it the moment it becomes complete. This can only exist where both parties are present.

The position may be illustrated by the case before us. If the contract became complete as we think it did, on the acceptance of offer by the applicant, on December 21, 1844, the company of course, could have no knowledge of it until the letter of acceptance reached the agent, on the 31st of the month; and on the other hand, upon the hypothesis it was not complete until notice of the acceptance and then became so, the applicant could have no knowledge of it at the time it took effect In either aspect and, indeed, in any aspect in which the case can be presented, one of the parties must be unadvised of the time when the contract takes effect, as its consummation must depend upon the act of one of them in the absence of the other.

The negotiation being carried on through the mail, the offer and acceptance cannot occur at the same moment of time; nor, for the same reason, can the meeting of the minds of the parties on the subject be known by each at the moment of concurrence; the acceptance must succeed the offer after the lapse of some interval of time; and, if the process is to be carried farther in order to complete the bargain, and notice of the acceptance must be received, the only effect is to reverse the position of the parties, changing the knowledge of the completion from the one party to the other.

It is obviously impossible, therefore, under the circumstances stated, ever to perfect a contract by correspondence, if a knowledge of both parties at the moment they become bound is an essential element in making out the obligation. And as it must take effect, if effect is given at all to an endeavor to enter into contract by correspondence, in the absence of the knowledge of one of the parties at the time of its consummation, it seems to us more consistent with the acts and declarations of the parties, to consider it complete on the transmission of the acceptance of the offer in the way they themselves contemplated, instead of postponing its completion till

notice of such acceptance has been received and assented to by the company.

For why make the offer, unless intended that an assent to its terms should bind them? And why require any further assent on their part, after an unconditional acceptance by the party to whom it is addressed?

We have said that this view is in accordance with the usages and practice of those companies, as well as with the general principles of law governing contracts entered into by absent parties.

In the instructions of this company to their agent at Fredericksburg, he is advised to transmit all applications for insurance to the office for consideration; and that, upon the receipt of an answer, if the applicant accepts the terms, the contract is considered complete without waiting to communicate the acceptance to the company; and the policy to be thereafter issued is to bear date from the time of the acceptance.

The company desires no further communication on the subject, after they have settled upon the terms of the risk, and sent them for the inspection of the applicant, in order to the consummation of the bargain. The communication of the acceptance by the agent afterward is to enable them to make out the policy. The contract is regarded as complete on the acceptance of the terms.

This appears, also, to have been the understanding of the agent; for, on communicating to the insured the terms received from the company, he observes, "Should you desire to effect the above insurance, send me your check payable to my order for fifty-seven dollars and the business is concluded"; obviously enough importing that no other step would be necessary to give effect to the insurance of the property upon the terms stated.

The cases of *Adams* v. *Lindsell*, 1 Barn. & Ald. 681, and *Mactier's Adm'rs* v. *Frith*, 6 Wend. (N.Y.), 104, are authorities to show that the above view is in conformity with the general principles of law governing the formations of all contracts entered into between parties residing at a distance by means of correspondence.

The unqualified acceptance by the one of the terms proposed by the other, transmitted by due course of mail, is regarded as closing the bargain, from the time of the transmission of the acceptance.

This is, also, the effect of the case of *Eliason* v. *Henshaw*, 4 Wheat., 228, in this court, though the point was not necessarily involved in the decision of the case. The acceptance there had not been

according to the terms of the bargain proposed, for which reason the plaintiff failed.

Upon the whole, without pursuing the examination further, we are of opinion that the decree of the court below should be reversed and that the cause be remitted with directions to the court to take such further proceedings therein as may be necessary to carry into effect the opinion of this court.

QUESTIONS

1. What was the issue under consideration in the principal case? How was this issue decided? What rule of law can be deduced from the decision?
2. Was the defendant's offer unilateral or bilateral? Would it have made any practical difference whether it was one or the other?
3. D offers to insure P's house on certain terms. P accepts the offer. Unknown to either party, the house burned just before P sent his letter of acceptance. P sues D for the loss. What decision?
4. Suppose that the agent of the company had written to the plaintiff, "Should you desire to effect the insurance, send me your check for $57, and the business is concluded upon receipt of the check," what would have been the decision of the court in an action by the plaintiff against the defendant for the loss?
5. When, in the opinion of this court, was the contract of insurance completed? What justification is there for the court's conclusion on this point?
6. Did the letter of acceptance ever reach the defendant? Suppose that the letter had never reached the company, would the court have arrived at a different conclusion?
7. D makes P an offer by telegraph. P sends an acceptance by letter. The letter never reaches D. P sues D for breach of an alleged contract. What decision?
8. D makes P an offer by letter. P sends an acceptance by telegraph. The telegram never reaches D. P sues D for breach of an alleged contract. What decision?
9. D sends P an offer by an office boy. P mails an acceptance. The letter is lost in transmission. P sues D on the alleged contract. What decision?
10. D sends P an offer by letter. P accepts by letter but fails to put a stamp on the letter. D never receives the acceptance. P sues D for breach of the alleged contract. What decision?
11. P misdirects the letter, as a consequence of which the letter is never delivered to D. P sues D for breach of the alleged contract. What decision?

12. P places a written acceptance of D's offer in a street letter box. Before the letter reached the post office, P received a revocation of the offer from D. P sues D for a breach of the alleged contract. What decision?

ROYAL INSURANCE COMPANY *v.* BEATTY

119 Pennsylvania State Reports 6 (1888)

An action of covenant afterward changed to assumpsit was brought by William Beatty against the Royal Insurance Company of Liverpool to recover on two policies of insurance, each for $3,000, and for the term of one year expiring at the same time on January 6, 1886.

At the close of the testimony, the defendant requested the court to charge the jury: that there was no evidence of an acceptance by the defendant of the offer to renew the plaintiff's policies, and the verdict of the jury must be for the defendant. The court refused to to affirm this point and submitted the cause upon the evidence, the charge not appearing upon the paper books.

The verdict of the jury was for the plaintiff, amount not shown, and, judgment being entered thereon, the defendant took this writ, assigning error, *inter alia*, the refusal to affirm the point submitted by the defendant.

GREEN, J. We find ourselves unable to discover any evidence of a contractual relation between the parties to this litigation. The contract alleged to exist was not founded upon any writing, nor upon any words, nor upon any act done by the defendant. It was founded alone upon silence. While it must be conceded that circumstances may exist which will impose a contractual obligation by mere silence, yet, it must be admitted that such circumstances which will impose such an obligation are exceptional in their character and of extremely rare occurrence. We have not been furnished with a perfect instance of the kind by the counsel on either side of the present case. Those cited for defendant in error had some element in them other than mere silence, which contributed to the establishment of the relation.

But in any point of view it is difficult to understand how a legal liability can arise out of the mere silence of the party sought to be affected, unless he was subject to a duty of speech, which was neglected to the harm of the other party. If there was no duty of speech there could be no harmful omission arising from mere silence. Take the present case as illustration. The alleged contract was a

contract of fire insurance. The plaintiff held two policies against the defendant, but they had expired before the loss occurred and had not been formally renewed. At the time of the fire, the plaintiff held no policy against the defendant. But he claims that the defendant agreed to continue the operation of the expired policies by what he calls "binding" them. How does he prove this? He calls a clerk, who took the two policies in question, along with other policies of another person, to the agent of the defendant to have them renewed, and this is the account he gives of what took place: "The Royal Company had some policies to be renewed and I went in and bound them. Q. State what was said and done. A. I went into the office of the Royal Company and asked them to bind the two policies of Mr. Beatty expiring tomorrow. The court: Whom were the policies for? A. For Mr. Beatty. The court: That is your name, is it not? A. Yes, sir. These were the policies in question. I renewed the policies of Mr. Priestly up to the last of April. There was nothing more said about the Beatty policies at that time. The court: What did they say? A. They did not say anything, but I suppose that they went to their books to do it. They commenced to talk about the night privilege, and that was the only subject discussed." In his further examination he was asked: "Q. Did you say anything about these policies (Robert Beatty's) at that time? A. No, sir, I only spoke of the two policies for William Beatty. Q. What did you say about them? A. I went in and said, 'Mr. Skinner, will you renew the Beatty policies and the night privilege for Mr. Priestly,' and that ended it. Q. Were the other companies bound in the same way? A. Yes, sir: and I asked the Royal Company to bind Mr. Beatty's."

The foregoing is the whole of the testimony for the plaintiff as to what was actually said at the time when it is alleged the policies were bound. It will be perceived that all the witness says, is, that he asked the defendant's agent to bind the two policies, as he states at first, or to renew them, as he says last. He received no answer, nothing was said, nor was anything done. How is it possible to make a contract out of this? It is not as if one declares or states a fact in the presence of another and the other is silent. If the declaration imposed a duty of speech on peril of an inference from silence, the fact of silence might justify the inference of an admission of the truth of the declared fact. It would then be only a question of bearing, which would be chiefly if not entirely for the jury. But here the

utterance was a question and not an assertion, and there was no answer to the question. Instead of silence being evidence of an agreement to do the thing requested, it is evidence, either that the question was not heard, or that it was not intended to comply with the request. Especially is this the case when, if a compliance was intended, the request would have been followed by an actual doing of the thing requested. But this was not done; how then can it be said it was agreed to be done. There is literally nothing upon which to base the inference of an agreement, upon such a state of facts. Hence the matter is for the court and not for the jury; for if there may not be an inference of the controverted fact the jury must not be permitted to make it.

What has thus far been said related only to the effect of the non-action of the defendant, either in responding or in doing the thing requested. There remains for consideration the effect of the plaintiff's non-action. When he asked the question whether the defendant would bind or renew the policies and obtained no answer, what was his duty? Undoubtedly to repeat his question until he obtained an answer. For his request was that the defendant should make a contract with him, and the defendant says nothing. Certainly such silence is not an assent in any sense. There should be something done, or else something said before it is possible to assume that a contract was established. There being nothing done and nothing said, there is no footing upon which an inference of an agreement can stand. But what was the position of the plaintiff? He had asked the defendant to make a contract with him and the defendant had not agreed to do so; he had not even answered the question whether he would do so. The plaintiff knew he had obtained no answer, but he does not repeat the question; he, too, is silent thereafter, he does not get the thing done which he asks to be done. Assuredly, it was his duty to speak again, and to take further action if he really intended to obtain the affirmative and positive, and without it he has no status. But he desists, and does, and says nothing further. And so it is that the whole of the plaintiff's case is an unanswered request to the defendant to make a contract with the plaintiff, and no further attempt by the plaintiff to obtain an answer, and no actual contract made. Out of such facts it is not possible to make a legal inference of a contract.

The other facts proved and offered to be proved, but rejected improperly, as we think and supposed by each to be consistent with

his theory, tend much more strongly in favor of the defendant's theory than of the plaintiff's. It is not necessary to discuss them, since the other views we have expressed are fatal to the plaintiff's claim. Nor do I concede that if defendant heard plaintiff's request and made no answer, an inference of assent should be made. For the hearing of a request, and not answering it is as consistent, indeed more consistent, with a dissent than an assent. If one is asked for alms on the street and hears the request, but makes no answer, it certainly cannot be inferred that he intends to give them. In the present case there is no evidence that defendant heard the plaintiff's request, and without hearing there was, of course, no duty of speech.

Judgment reversed.

QUESTIONS

1. What error did the trial court make in this case? What course should the court have taken in the trial of this case?
2. Precisely what does this case decide? Does it decide that silence cannot be an acceptance of an offer?
3. Suppose that the company had been suing the plaintiff for insurance premiums, would the decision in this case have been the same?
4. Compare this case with the case of *Prescott* v. *Jones*, *supra*, p. 277. Do the two cases decide the same issue?
5. P says to D: "I will sell you my horse for $250, and if I do not hear from you to the contrary by tomorrow noon, I shall consider you the owner of the horse." D, intending to accept the offer, maintains silence. (*a*) P sues D for the price of the horse. (*b*) D sues P for his refusal to deliver possession of the horse. What decision in each case?
6. For several years, P had been selling a certain grade shoe to D. On one occasion, P sends a consignment of the same kind of shoes to D, without being requested to do so by the latter. The shoes are delivered at D's place of business. He makes no reply to P in regard to the shoes but does not open the boxes in which they are shipped. Two weeks later, D's store and all its contents burn. P sues D for the purchase price of the shoes. What decision?
7. D borrowed a horse from P, agreeing to return it on demand. Later, P writes to D: "I will sell you the horse for $250. If you wish to buy at that price, just keep the horse; otherwise, return the animal at once." D makes no reply to P's communication but does not return the horse. Three days later, the horse dies. P sues D for the price of the animal. What decision?
8. P says to an agent of the D Insurance Company: "I understand you have insured my house on the same basis as last year." The agent as a

matter of fact, had not done so but said nothing in reply to P's statement. A few days later, the house burns. What decision in an action by P against the company for the loss?

BISHOP *v.* EATON

161 Massachusetts Report 496 (1894)

Contract, on a guaranty. Writ dated February 2, 1892. Trial in the Superior Court without a jury, before BRALEY, J., who found the following facts.

The plaintiff in 1886 was a resident of Sycamore in the State of Illinois, and was to some extent connected in business with Harry H. Eaton, a brother of the defendant. In December, 1886, the defendant in a letter to the plaintiff said, "If Harry needs more money, let him have it, or assist him to get it and I will see that it is paid."

On January 7, 1887, Harry Eaton gave his promissory note for two hundred dollars to one Stark, payable in one year. The plaintiff signed the note as surety, relying on the letter of the defendant, and looked to the defendant solely for reimbursement, if called upon to pay the note. Shortly afterward the plaintiff wrote to the defendant a letter stating that the note had been given and its amount, and deposited the letter in the mail at Sycamore, postage prepaid and properly addressed to the defendant at his home in Nova Scotia. The letter, according to the testimony of the defendant, was never received by him. At the maturity of the note the time for its payment was extended for a year, but whether with the knowledge or consent of the defendant was in dispute. In August, 1889, in an interview between them the plaintiff asked the defendant to take up the note still outstanding and pay it, to which the defendant replied: "Try to get Harry to pay it. If he don't I will. It shall not cost you anything."

On October 1, 1891, the plaintiff paid the note, and thereafter made no effort to collect it from Harry Eaton, the maker. The defendant testified that he had no notice of the payment of the note by the plaintiff until December 22, 1891.

The judge ruled, as matter of law upon the findings of fact, that the plaintiff was entitled to recover, and ordered judgment for him; and the defendant alleged exceptions.

KNOWLTON, J. The first question in this case is whether the contract proved by the plaintiff is an original and independent contract or a guaranty. The judge found that the plaintiff signed the

note relying upon the letter, "and looked to the defendant solely for reimbursement if called upon to pay the note." The promise contained in the letter was in these words: "If Harry needs more money, let him have it, or assist him to get it, and I will see that it is paid." On a reasonable interpretation of this promise, the plaintiff was authorized to adopt the first alternative, and to let Harry have the money in such a way that a liability of Harry to him would be created, and to look to the defendant for payment if Harry failed to pay the debt at maturity; or he might adopt the second alternative and assist him to get money from some one else in such a way as to create a debt from Harry to the person furnishing the money, and if Harry failed to pay, might look to the defendant to relieve him from liability. The words fairly imply that Harry was to be primarily liable for the debt, either to the plaintiff or to such other person as should furnish the money, and that the defendant was to guarantee the payment of it. We are therefore of opinion, that, if the plaintiff relied solely upon the defendant, he was authorized by the letter to rely upon him only as a guarantor.

The defendant requested many rulings in regard to the law applicable to contracts of guaranty, most of which it becomes necessary to consider. The language relied on was an offer to guarantee, which the plaintiff might or might not accept. Without acceptance of it there was no contract, because the offer was conditional and there was no consideration for the promise. But this was not a proposition which was to become a contract only upon giving of a promise for the promise, and it was not necessary that the plaintiff should accept it in words, or promise to do anything before acting upon it. It was an offer which was to become effective as a contract upon the doing of the act referred to. It was an offer to be bound in consideration of an act to be done, and in such a case the doing of the act constitutes the acceptance of the offer and furnished the consideration. Ordinarily there is no occasion to notify the offeror of the acceptance of such an offer, for the doing of the act is a sufficient acceptance, and the promisor knows that he is bound when he sees that action has been taken on the faith of his offer. But if the act is of such kind that knowledge of it will not quickly come to the promisor, the promisee is bound to give him notice of his acceptance within a reasonable time after doing that which constitutes the acceptance. In such a case it is implied in the offer that, to complete the contract, notice shall be given with due diligence, so that the promisor may know that a

contract has been made. But where the promise is in consideration of an act to be done, it becomes binding upon the doing of the act so far that the promisee cannot be affected by a subsequent withdrawal of it, if within a reasonable time afterward he notifies the promisor in accordance with these principles. It has been held in cases like the present where the guarantor would not know of himself, from the nature of the transaction, whether the offer has been accepted or not, that he is not bound without notice of the acceptance, seasonably given after the performance which constitutes the consideration. *Babcock* v. *Bryant*, 12 Pick. 133. *Whiting* v. *Stacy*, 15 Gray, 270. *Schlessinger* v. *Dickinson*, 5 Allen, 47.

In the present case the plaintiff seasonably mailed a letter to the defendant, informing him of what he had done in compliance with the defendant's request, but the defendant testified that he never received it, and there is no finding that it ever reached him. The judge ruled, as matter of law, that upon the fact found, the plaintiff was entitled to recover, and the question is thus presented whether the defendant was bound by the acceptance when the letter was properly mailed, although he never received it.

When an offer of guaranty of this kind is made, the implication is that notice of the act which constitutes an acceptance of it shall be given in a reasonable way. What kind of a notice is required depends upon the nature of the transaction, the situation of the parties and the inference fairly to be drawn from their previous dealings, if any, in regard to the matter. If they are so situated that communication by letter is naturally to be expected, then the deposit of a letter in the mail is all that is necessary. If that is done, which is fairly to be contemplated from their relations to the subject-matter and from their course of dealing, the rights of the parties are fixed, and a failure actually to receive the notice will not affect the obligation of the guarantor.

The plaintiff in the case now before us resided in Illinois, and the defendant in Nova Scotia. The offer was made by letter, and the defendant must have contemplated that information in regard to the plaintiff's acceptance or rejection of it would be by letter. It would be a harsh rule which would subject the plaintiff to the risk of the defendant's failure to receive the letter giving notice of his action on the faith of the offer. We are of opinion that the plaintiff, after assisting Harry to get the money, did all that he was required to do when he seasonably sent the defendant the letter by mail informing him of what had been done.

How far such considerations are applicable to the case of an ordinary contract made by letter, about which some of the early decisions are conflicting, we need not consider.

We find one error in the ruling which requires us to grant a new trial. It appears from the bill of exceptions that when the note became due the time for the payment of it was extended without the consent of the defendant. The defendant is thereby discharged from his liability, unless he subsequently assented to the extension and ratified it. *Chace* v. *Brooks*, 5 Cush. 43. *Carkin* v. *Savory*, 14 Gray, 528. The court should therefore have ruled substantially in accordance with the defendant's eighth request, instead of finding for the plaintiff, as matter of law, on the facts reported. Whether the judge would have found a ratification on the evidence if he had considered it, we have no means of knowing.

Exceptions sustained.

QUESTIONS

1. What was the nature of the offer under consideration in the principal case? What kind of an acceptance did the offer call for?
2. Suppose that the defendant's offer had read, "If you will agree to advance money to Harry as he needs it, I will see that you are repaid," would the court have entertained the same opinion concerning the validity of the acceptance?
3. Suppose that plaintiff, defendant, and Harry had all lived in the same town, would the decision of the court have been the same?
4. D states to his relatives, living in the same community with him, "I will give $500 a year to any one of you who will support my aged father." P supports the father for three years and brings an action against D for $1,500. D's defense is that P never gave notice of his acceptance. What decision?
5. D, living in New York, writes P, in Chicago, "I will give you $500 if you paint my house on University Avenue, Chicago." P paints the house as requested. P sues D for $500 for his services. D's defense is that P never notified him of his acceptance of the offer. What decision?

ELIASON *v.* HENSHAW

4 Wheaton's United States Reports 225 (1819)

WASHINGTON, J. This is an action, brought by the defendant in error, to recover damages for the non-performance of an agreement alleged to have been entered into by the plaintiffs in error for the

purchase of a quantity of flour at a stipulated price. The evidence of this contract as given in the court below, is stated in a bill of exceptions, and is to the following effect: "Capt. Conn informs us that you have a quantity of flour to dispose of. We are in the practice of purchasing flour at all times in Georgetown, and we will be glad to serve you, whether in receiving your flour in store, when the markets are dull, and disposing of it when the markets will answer to advantage, or we will purchase at market price when delivered; if you are disposed to engage two or three hundred barrels at present, we will give you 9 dollars 50 cents per barrel, deliverable the first water in Georgetown, or any service we can. If you should want an advance, please write us by mail, and will send you part of the money in advance." In a postscript they add, "Please write by return of wagon whether you accept our offer." This letter was sent from the house at which the writer then was, about 2 miles from Harper's Ferry, to the defendant at his mill, at Mill Creek, distant about 20 miles from Harper's Ferry, by a wagoner then employed by the defendant to haul flour with his wagon. He delivered the letter to the defendant on the 14th of the same month, to which an answer, dated the succeeding day, was written by the defendant addressed to the plaintiffs at Georgetown, and despatched by a mail which left that week on the 19th, being the first regular mail from that place to Georgetown. In this letter the writer says, "Your favor of the 10th inst. was handed me by Mr. Chenoweth last evening. I take the earliest opportunity to answer it by post. Your proposal to engage 300 barrels of flour, delivered in Georgetown, by the first water, at 9 dollars 50 cents per barrel, I accept, and shall send on the flour by the first boats that pass down from where my flour is stored on the river; as to any advance, will be unnecessary—payment on delivery is all that is required."

On the 25th of the same month, the plaintiffs addressed to the defendant an answer to the above, dated at Georgetown, in which they acknowledge the receipt of it, and add, "Not having heard from you before, had quite given over the expectation of getting your flour, more particularly as we requested an answer by return of wagon the next day, and as we did not get it, had bought all we wanted."

The wagoner, by whom the plaintiffs' first letter was sent, informed them, when he received it, that he should not probably return to Harper's Ferry, and he did not in fact return in the defendant's employ. The flour was sent down to Georgetown some time in

March, and the delivery of it to the plaintiffs was regularly tendered and refused.

Upon this evidence, the defendants in the Court below, the plaintiffs in error, moved that Court to instruct the jury, that, if they believed the said evidence to be true as stated, the plaintiff in this action was not entitled to recover the amount of the price of the 300 barrels of flour at the rate of 9 dollars 50 cents per barrel. The Court being divided in opinion, the instruction prayed for was not given.

The question is, whether the Court below ought to have given the instruction to the jury, as the same was prayed for. If they ought, the judgment, which was in favor of the plaintiff in that Court, must be reversed.

It is an undeniable principle of the law of contracts, that an offer of a bargain by one person to another imposes no obligation upon the former until it is accepted by the latter, according to the terms in which the offer was made. Any qualification of, or departure from, these terms, invalidates the offer, unless the same be agreed to by the person who made it. Until the terms of the agreement have received the assent of both parties, the negotiation is open, and imposes no obligation upon either.

In this case, the plaintiffs in error offered to purchase from the defendant two or three hundred barrels of flour, to be delivered at Georgetown, by the first water, and to pay for the same 9 dollars 50 cents per barrel. To the letter containing this offer, they required an answer by the return of the wagon, by which the letter was despatched. This wagon was, at that time in the service of the defendant, and employed by him in hauling flour from his mill to Harper's Ferry, near to which place the plaintiffs then were. The meaning of the writers was obvious. They could easily calculate by the usual length of time which was employed by this wagon, in traveling from Harper's Ferry to Mill Creek, and back again with a load of flour, about what time they should receive the desired answer, and therefore, it was entirely unimportant, whether it was sent by that, or another wagon, or in any other manner, provided it was sent to Harper's Ferry, and was not delayed beyond the time which was ordinarily employed by wagons engaged in hauling flour from the defendant's mill to Harper's Ferry. Whatever uncertainty there might have been as to the time when the answer would be received, there was none as to the place to which it was to be sent; this was distinctly indicated

by the mode pointed out for the conveyance of the answer. The place, therefore, to which the answer was to be sent, constituted an essential part of the plaintiff's offer.

It appears, however, from the bill of exceptions, that no answer to this letter was at any time sent to the plaintiffs, at Harper's Ferry. Their offer, it is true, was accepted by the terms of a letter addressed to Georgetown, and received by the plaintiffs at that place; but an acceptance communicated at a place different from that pointed out by the plaintiffs, and forming a part of their proposal, imposed no obligation binding upon them, unless they had acquiesced in it, which they declined doing.

It is no argument, that an answer was received at Georgetown; the plaintiffs in error had a right to dictate the terms upon which they would purchase the flour and unless they were complied with, they were not bound by them. All their arrangements may have been made with a view to the circumstances of place, and they were the only judges of its importance. There was, therefore, no contract concluded between these parties, and the Court ought, therefore, to have given the instruction to the jury which was asked for.

Judgment reversed. Cause remanded, with directions to award a *venire facias de novo*.

QUESTIONS

1. What is meant by the expression *defendant in error? Plaintiff in error?*
2. What issue was under consideration in the principal case? How was this issue decided? What rule of law can be deduced from the decision?
3. Suppose that the letter of acceptance in this case had reached the plaintiff in error just as quickly, coming through Georgetown as being returned by the wagoner, would the decision in this case have been the same?
4. Suppose that nothing had been said in this case about the mode or place of acceptance and that the defendant in error had accepted by sending the letter to the plaintiff in error through Georgetown, would the decision have been the same?
5. What would have been the decision of the court in case the plaintiff in error had been suing the defendant in error for the latter's refusal to sell flour?
6. D makes an offer to P "to be accepted by telegraph only." P accepts the offer by letter. (*a*) P sued D on the alleged contract. (*b*) D sues P on the alleged contract. What decision in each case?
7. D makes an offer to P, "acceptance to be sent to me at St. Louis." P sends an acceptance of it to D at Chicago. (*a*) P is suing D. (*b*) D is suing P. What decision in each case?

8. D makes an offer to P, "acceptance to be in my hands by noon of May 1." P sends an acceptance but it does not reach D until 3 P.M. of that day. (*a*) P sues D on the alleged contract. (*b*) D sues P on the alleged contract. What decision in each case?
9. When the offeror has not stipulated the mode of acceptance, how is the offeree to know what mode of acceptance to make use of?
10. When an offeror has not stated the place to which an acceptance is to be sent, how is the offeree to know where to send it?
11. When the offeror has not indicated the time within which an offer must be accepted, how is the offeree to know how much time he has within which to make his acceptance?
12. As a practical matter, would you, in the making of an offer, specify the time, place, and mode of acceptance? Why or why not?

c) The Consideration

RANN *v.* HUGHES

7 Term Reports 350, Note *a* (1764)

This was an action in assumpsit. The defendant pleaded non-assumpsit.

SKYNNER, C. B. It is undoubtedly true that every man is by law of nature bound to fulfill his engagements. It is equally true that the law of this country supplies no means, nor affords any remedy, to compel the performance of an agreement made without sufficient consideration; such agreement is *nudum pactum ex quo non oritur actio;* and whatsoever may be the sense of this maxim in the civil law, it is in the last-mentioned sense only that it is to be understood in our law. The declaration states that the defendant being indebted as administratrix promised to pay when requested, and the judgment is against the defendant generally. The *being indebted* is of itself a sufficient consideration to ground a promise, but the promise must be co-extensive with the consideration unless some consideration of fact can be found here to warrant the extension of it against the defendant in her own capacity. If a person indebted in one right in consideration of forbearance for a particular time promise to pay in another right, this convenience will be a sufficient consideration to warrant an action against him or her in the latter right; but here no sufficient consideration occurs to support this demand against her in her personal capacity, for she derives no advantage or convenience from the promise here made. For if I promise generally to pay upon

request what I was liable to pay upon request in another right, I derive no advantage or convenience from this promise, and therefore there is not sufficient consideration for it.

But it is said that if this promise is in writing, that takes away the necessity of consideration, and obviates the objection of the *nudum pactum*, for that cannot be where the promise is put in writing; and that after verdict, if it were necessary to support the promise that it should be in writing, it will after verdict be presumed that it was in writing; and this last is certainly true; but that there cannot be *nudum pactum* in writing, whatever may be the rule of the civil law, there is certainly none such in the law of England. His Lordship observed upon the doctrine of *nudum pactum* delivered by Mr. J. WILMOT, in the case of *Pillans* v. *Van Mierop and Hopkins*, 3 Burr. 1663, that he contradicted himself, and was also contradicted by Vinnius in his Comment on Justinian.

All contracts are, by the laws of England, distinguished into agreements by specialty, and agreements by parol; nor is there any such third class as some of the counsel have endeavored to maintain as contracts in writing. If they be merely written and not specialties, they are parol, and a consideration must be proved. But it is said that the Statute of Frauds has taken away the necessity of any consideration in this case; the Statute of Frauds was made for the relief of personal representatives and others, and did not intend to charge them further than by common law they were chargeable.

His Lordship here read these sections of that statute which relate to the present subject. He observed that the words were merely negative and that executors and administrators should not be liable out of their own estates, unless the agreement upon which the action was brought, or some memorandum thereof, was in writing and signed by the party. But this does *not* prove that the agreement was still not liable to be tried and judged of as all other agreements are by the common law, and does not prove the converse of the proposition, that when in writing the party must be at all events liable. He here observed upon the case *Pillans* v. *Van Mierop* in Burr, and the case of *Losh* v. *Williamson;* and so far as these cases went on the doctrine of *nudum pactum*, he seemed to intimate that they were erroneous. He said that all his brothers concurred with him that in this case there was not a sufficient consideration to support this demand as a personal demand against the defendant, and that its being now sup-

posed to have been in writing makes no difference. The consequence of which is that the question put to us must be answered in the negative.

And the judgment in the Exchequer Chamber was affirmed.

QUESTIONS

1. It is assumed in the principal case that the defendant was indebted to the plaintiff in a certain sum of money. Why was not his promise to pay the debt enforcible in an action of assumpsit? Would the debt have been enforcible against him in an action of debt?
2. The court said: "The *being indebted* is of itself a sufficient consideration to ground a promise." What is meant by this statement? The plaintiff in this case, being indebted, made a promise to pay the debt, why was the promise not enforcible in assumpsit?
3. What is meant by the Statute of Frauds? Was this statute enacted for the purpose of making all promises per se enforcible?
4. "All contracts are, by the laws of England, distinguished into agreements by specialty, and agreements by parol." What is the distinction between these two classes of agreements?
5. "If they be merely written and not specialties, they are parol, and a consideration must be proved." What does the court mean by this statement?
6. D owes P a debt of 200 pounds. What were P's remedies against D prior to 1600? What were his remedies after 1600?
7. P promises to pay D 200 pounds for Blackacre. D promises to convey Blackacre for that price. What remedy did P have against D on his promise before 1500? What remedy did he have after 1500?
8. Trace the development of the doctrine of the enforcibility of simple promises, with particular emphasis upon the test of enforcibility.
9. What influences were operating to bring about the enforcibility of simple promises?
10. Show how assumpsit became concurrent with debt for the recovery of a debt. What forces were operating to bring this development about?
11. What was the test of the existence of an enforcible debt? Was this test brought over when assumpsit became concurrent with debt?
12. Why did the attempt in *Pillans* v. *Van Mierop*, to make all written promises enforcible, fail to meet with favor in the law?
13. "A seal imports a consideration." "When a seal is affixed to a written promise, a consideration for the promise is implied." Comment on these statements.

HAMER *v.* SIDWAY

124 New York Appellate Court 538 (1891)

PARKER, J. The trial court found as a fact that "on March 20, 1869, William E. Story agreed to and with William E. Story 2nd, that if he would refrain from drinking liquor, using tobacco, swearing, and playing cards or billiards for money until he should become 21 years of age then he, the said William E. Story, would at that time pay him, the said William E. Story 2nd, the sum of $5,000 for such refraining, to which the said William E. Story 2nd agreed," and that he "in all things fully performed his part of said agreement."

The defendant contends that the contract was without consideration to support it, and therefore, invalid. He asserts that the promisee by refraining from the use of liquor and tobacco was not harmed but benefited; that that which he did was best for him to do independently of his uncle's promise, and insists that it follows that unless the promisor was benefited, the contract was without consideration. A contention, which if well founded, would seem to leave open for controversy in many cases whether that which the promisee did or omitted to do was, in fact, of such benefit to him as to leave no consideration to support the enforcement of the promisor's agreement. Such a rule could not be tolerated, and is without foundation in the law. The Exchequer Chamber, in 1875, defined consideration as follows: "A valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance detriment, loss or responsibility given, suffered or undertaken by the other." Courts "will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to anyone. It is enough that something is promised, done, forborne or suffered by the party to whom the promise is made as consideration for the promise made to him." (Anson's Prin. of Con. 63.)

"In general a waiver of any legal right at the request of another party is a sufficient consideration for a promise." (Parsons on Contracts, 444.)

"Any damage, or suspension, or forbearance of a right will be sufficient to sustain a promise." (Kent, vol. 2, 465, 12th Ed.)

Pollock, in his work on contracts, page 166, after citing the definition given by the Exchequer Chamber already quoted, says: "The second branch of this judicial description is really the most

important one. Consideration means not so much that one party is profiting as that the other abandons some legal right in the present or limits his legal freedom of action in the future as an inducement for the promise of the first."

Now applying this rule to the facts before us, the promisee used tobacco, occasionally drank liquor, and he had a legal right to do so. That right he abandoned for a period of years upon the strength of the promise of the testator that for such forbearance he would give him $5,000. We need not speculate on the effort which may have been required to give up the use of those stimulants. It is sufficient that he restricted his lawful freedom of action within certain prescribed limits upon the faith of his uncle's agreement, and now having fully performed the conditions imposed, it is of no moment whether such performance actually proved a benefit to the promisor, and the court will not inquire into it; but were it a proper subject of inquiry, we see nothing in this record that would permit a determination that the uncle was not benefited in a legal sense. Few cases have been found which may be said to be precisely in point, but such as have been support the position we have taken.

Order reversed and judgment of Special Term affirmed.

QUESTIONS

1. What issue was under consideration in the principal case? How was the issue decided? What rule of law can be deduced from the decision?
2. What test or tests did the court lay down in this case for determining whether there was a consideration for the promise to pay $5,000 to the promisee?
3. Does it appear that the promisor reaped any benefit from the promisee's conduct? Does it appear that the promisee suffered any detriment in doing what he did?
4. In this opinion the court speaks of "benefit" and "detriment" as tests of the enforcibility of promises. Trace the origin and development of these two concepts.
5. What was the nature of the offer which the promisor made in the principal case? Was it unilateral or bilateral?
6. D promises to pay P's expenses if he will take a European trip. P takes the trip. What decision in an action by P against D for his expenses?
7. D promises to pay P's expenses if he will attend college four years. P does as requested. What decision in an action by P against D for his expenses while in college?

8. D promises P $500 if she will name her first-born after him. P complies with the request. Is she entitled to recover $500 from D?
9. D promises to pay his divorced wife $1,500 if she will conduct herself virtuously and soberly. P sues for the money and offers evidence tending to show that she has lived virtuously and soberly since her divorce. Is the evidence admissible?
10. Examine the case of *Ricketts* v. *Scothorn*, *supra* 262, and be prepared to answer why there was not a sufficient consideration to support the promise in that case?

SCHNELL *v.* NELL

17 Indiana Reports 29 (1861)

PERKINS, J. The case turned below, and must turn here, upon the question whether the instrument sued on does express a consideration sufficient to give it legal obligation, as against Zacharias Schnell. It specifies three distinct considerations for his promise of $600: (1) A promise, on the part of the plaintiffs, to pay him one cent. (2) The love and affection he bore his deceased wife, and the fact that she had done her part, as his wife, in the acquisition of property. (3) The fact that she had expressed her desire, in the form of an inoperative will, that the persons named therein should have the sums of money specified.

The consideration of one cent will not support the promise of Schnell. It is true that as a general proposition, inadequacy of consideration will not vitiate an agreement. *Baker* v. *Roberts*, 14 Ind. 552. But this doctrine does not apply to a mere exchange of sums of money, of coin, whose value is exactly fixed, but to the exchange of something of, in itself indeterminate value, for money, or, perhaps for some other thing of indeterminate value. In this case, had the one cent mentioned been some particular one cent, a family piece, or ancient, remarkable coin, possessing an indeterminate value, extrinsic from its simple money value, a different view might be taken. As it is the mere promise to pay six hundred dollars for one cent, even had the portion of that cent due from the plaintiff been tendered, is an unconscionable contract, void at first blush, upon its face, if it be regarded as an earnest one. *Hardesty* v. *Smith*, 3 Ind. 39. The consideration of one cent is, plainly, in this case, merely nominal, and intended to be so. As the will and testament of Schnell's wife imposed no legal obligation upon him to discharge her bequests

out of his property, and as she had none of her own, his promise to discharge them was not legally binding upon him, on that ground. A moral consideration, only, will not support a promise. Ind. Dig., p. 13. And for the same reason, a valid consideration for his promise cannot be found in the fact of a compromise of a disputed claim; for where such claim is legally groundless, a promise upon a compromise of it, or of a suit upon it, is not legally binding. *Spahr* v. *Hollingshead*, 8 Blackf. 415. There was no mistake of law or fact in this case, as the agreement admits the will to be inoperative and void. The promise was simply one to make a gift. The past services of his wife, and the love and affection he had borne her, are objectionable as legal considerations for Schnell's promise, on two grounds: (1) They are past considerations. Ind. Dig., p. 13. (2) The fact that Schnell loved his wife, and that she had been industrious, constituted no consideration for his promise to pay J. B. Nell and the Lorenzes a sum of money. Whether, if his wife, in her lifetime had made a bargain with Schnell, that, in consideration of his promising to pay, after her death, to the persons named, a sum of money, she would be industrious and worthy of his affections, such a promise would have been valid and consistent with public policy, we need not decide. Nor is the fact that Schnell now venerated the memory of his deceased wife a legal consideration for a promise to pay any third person money.

The instrument sued on, interpreted in the light of the facts alleged in the second paragraph of the answer, will not support an action. The demurrer to the answer should have been overruled. See *Stevenson* v. *Druley*, 4 Ind. 519.

QUESTIONS

1. What rule of law does this case lay down? Does the rule seem logical? Does it seem just?
2. The court might have reached its conclusion for one of several reasons: (*a*) that a smaller sum of money cannot be a consideration for a promise to pay a larger sum; (*b*) that the penny was never in fact paid; (*c*) that the promise to pay $600 was intended as a gift, and that the penny or promise to pay a penny, was never intended as a consideration. Which, in your opinion, would have been the strongest reason for the decision?
3. D says to P: "I will give you $10 for that Lincoln penny with a hole in it." P gives him the penny and sues for the $10. What decision?
4. D promises to pay P $300 for a horse, the market value of which is about $150. P sues D on his promise. D contends that he is not bound because the horse is not worth $300. What decision?

5. D promises P $100 for stock in a corporation. The stock is worth about $50. P sues D on his promise. What decision?
6. P gives D $100 on January 1 for D's promise to return $200 on February 1. Aside from any question of usury, is this promise binding?
7. The court said in this case that "inadequacy of consideration will not vitiate an agreement." What is meant by this?
8. What may great inadequacy of consideration in an agreement tend to prove?
9. The court says "a moral consideration, only, will not support a promise." What is a moral consideration? When will it support a promise?
10. The court says that the services of the wife "are past considerations." What is a past consideration? Will a past consideration ever support a promise?

BURGESSER *v.* WENDEL

73 New Jersey Law Reports 286 (1906)

SWAYZE, J. The District Court found that the plaintiff had resided with the defendant prior to his marriage; that upon that event he provided another house for her, and promised to pay her a certain sum (afterwards fixed at $10) weekly as long as she should continue to reside in the new house; that she was still residing in the house; and that the defendant had failed to pay the weekly allowance for ten weeks. He rendered judgment in favor of the plaintiff for $80.

It is now argued on behalf of the defendant that the facts as found do not warrant the judgment, because they fail to show a consideration, and because, to state the point in the language of the appellant's brief, "there was no agreement in this case as contemplated by the statute of frauds, because there was simply a voluntary payment without consideration." Before the trial court this objection was stated to be that the contract was not to be performed within one year.

We think the case shows an agreement and not a mere voluntary payment. There was an arrangement between the parties for a change of the plaintiff's residence, and upon this arrangement she acted. If this were not so, the point was not made in the trial court, and cannot now be considered. *O'Donnell* v. *Weiler*, 43 Vroom 142.

There was a legal consideration for the defendant's promise. The change of the plaintiff's residence may have been a benefit to the defendant, or a detriment to the plaintiff, or both.

That contracts of this character do not require a memorandum in writing under the fifth section of our statute of frauds has been decided by this court.

We find no errors, and the judgment must be affirmed, with costs.

QUESTIONS

1. What was the consideration, if any, for the defendant's promise in the principal case?
2. What test did the court lay down for determining whether the plaintiff's conduct constituted a consideration for the promise of the defendant?
3. Does a reasonable construction of the facts of this case show that the defendant was buying the conduct of the plaintiff by his promise?
4. D says to P: "If you will meet me at the bank at noon, I will give you $25." P meets D at the time and place appointed. Is D's promise binding?
5. D writes to his sister, living in another part of the state, "If you will move here near me, I will furnish you with a good home as long as you live." At considerable expense to herself, P moves up near D. D fails and refuses to furnish her any sort of a home. P sues D for breach of the alleged contract to furnish her a home. What decision?

BORDEN *v.* BOARDMAN

157 Massachusetts Reports 410 (1892)

Contract. C contracted to build a house for defendant. When the time for the first payment came defendant requested C to have present all persons having claims against the house. Plaintiffs had a claim for $150, but were not present, and at C's request defendant reserved from the amount due $200 out of which he promised to pay plaintiff's claim. Plaintiffs subsequently asked defendant about the arrangement, and defendant said he held the money under the above agreement with C, but had been advised not to pay it at present. Defendant claimed that, upon the evidence, plaintiffs were not entitled to recover, and offered to show that a day or so after the above settlement C had abandoned the contract, and that when plaintiffs inquired about the arrangement defendant informed them that C had broken his contract, and that defendant was damaged thereby. This evidence was excluded and a verdict directed for plaintiffs. If the ruling was right, the judgment was to be entered on the verdict; otherwise, judgment for defendant.

MORTON, J. The evidence offered in bar was rightly excluded. The subsequent failure of Collins to perform his contract would not release the defendant from the obligation, if any, which he had assumed to the plaintiffs, in the absence of any agreement, express or implied, that the money was to be paid to the plaintiffs only in case Collins

fulfilled his contract. *Cook* v. *Wolfendale*, 105 Mass. 401. There was no evidence of such an agreement.

The other question is more difficult. The case does not present a question of novation; for there was no agreement among the plaintiffs, Collins, and the defendant that the defendant should pay to the plaintiffs, out of the money in his hands and due to Collins, a specific sum, and that thenceforward the defendant should be released from all liability for it to Collins, and should be liable for it to the plaintiffs. Neither was there any agreement between the plaintiffs and the defendant that the latter would pay the money to them. The conversation between one of the plaintiffs and the defendant cannot be construed as affording evidence of such an agreement. Coupled with the defendant's admission that he was holding money for the plaintiffs was his repudiation of any liability to the plaintiffs for it. Neither can it be claimed that there was an equitable assignment of the amount in suit from Collins to the plaintiffs. There was no order or transfer given by him to them; nor was any notice of the arrangement between him and the defendant given by him to the plaintiffs. *Laxarus* v. *Swan*, 147 Mass. 330. The case upon this branch, therefore, reduced to its simplest form, is one of an agreement between two parties, upon sufficient consideration it may be between them that one will pay, out of the funds in his hand belonging to the other, a specific sum to a third person, who is not a party to the agreement, and from whom no consideration moves. It is well settled in this state that no action lies in such a case in favor of such third party to recover the money so held of the party holding it. *Exchange Bank* v. *Rise*, 107 Mass. 37, and cases cited; *Rogers* v. *Union Stone Co.*, 130 Mass. 581; *New England Dredging Co.* v. *Rockport Granite Co.*, 149 Mass. 381; *Marston* v. *Bigelow*, 150 Mass. 45; *Saunders* v. *Saunders*, 154 Mass. 337. Certain exceptions which were supposed to exist have either been shown not to exist, or have been confined within narrower limits. *Exchange Bank* v. *Rice*, and *Marston* v. *Bigelow*, *ubi supra*.

We have assumed that the sum which the defendant agreed with Collins to pay the plaintiffs was specific. But it is to be observed that the agreement between the plaintiffs and Collins was that it should not cost more than one hundred and fifty dollars to put the building back. Collins told the defendant that the sum was due to the plaintiffs. The defendant reserved two hundred dollars. It may well be doubted, therefore, whether the defendant had in his hands a specific

sum to be paid to the plaintiffs, or whether he agreed with Collins to hold and pay the plaintiffs a specific sum. If the sum was not specific, the plaintiffs do not claim as we understand them, that they can recover.

Judgment for the defendant.

QUESTIONS

1. What was the issue under consideration in the principal case? How was this issue decided? What rule of law can be deduced from the decision?
2. Could the defendant have been held as trustee of the money for the plaintiff?
3. The defendant owed C money. A part of this he agreed to pay to the plaintiff. Why was this not an assignment of a part of C's claim to the plaintiff?
4. The court says: "This case does not present a question of novation." What is meant by a novation? Why was there not a novation in this case?
5. X advanced $300 to D, in consideration of D's promise to pay $300 to P, to whom X owed that amount. P is suing D for money. What decision?
6. X gives D $500 for the latter's promise to support P, brother of X, for one year. P is suing D for failure to support him. What decision?
7. The D Water Company contracts with the city of X to furnish sufficient water pressure for fire protection. P's house burns because of insufficient water pressure. P sues the D Water Company for damages. What decision?
8. The D Insurance Company insures X's life and agrees to pay the loss to P on the death of X. P brings an action on the policy after the death of X. What decision?
9. X advanced $300 to D, in consideration of D's promise to pay $300 to P, to whom X owed that amount. Before P learns of the promise for his benefit, P sues D for $300. D's defense is that he and X rescinded the agreement before P learned of it. What decision?
10. In the foregoing case, D's defense is that X procured the promise by fraud. What decision?
11. D's defense is that P is suing X on the original debt. What decision?
12. D's defense is that X is also suing him for his failure to pay the money to X. What decision?

BAILEY *v.* AUSTRIAN

19 Minnesota Reports 535 (1873)

BERRY, J. If the testimony, which plaintiffs contend was erroneously rejected, had been received, it would, together with the evidence introduced, have tended (upon the construction most favorable to plaintiffs), to establish a state of facts substantially as follows, viz.: That on the second day of September, 1871, plaintiffs being engaged in a general foundry business at St. Paul, defendant promised to supply them with all the Lake Superior pig iron wanted by them in their said business, from said date until December thirty-first next ensuing, at specified prices, and that plaintiffs simultaneously promised to purchase of defendant all of said iron, which they might want in their said business, during the time above mentioned, at said prices. If this state of facts establishes any contract, it is a contract of *mutual promises*. That is to say, the sole consideration for defendant's promise to supply, is plaintiffs' promise to purchase, and vice versa.

The general rule (with exceptions not important in this instance) is, "that a promise is not a good consideration for a promise, unless there is an absolute mutuality of engagement, so that each party has the right at once to hold the other to a positive agreement." 1 Parson's Contracts, 449 and note z.

Upon the foregoing facts, the engagement of plaintiffs was to purchase all of said pig iron, which they might want in their said business during the time specified; but they do not engage to want any quantity whatever. They do not even engage to continue their business. If they see fit to discontinue it on the very day on which the supposed agreement is entered into, they are at entire liberty to do so at their own option, and, whatever might have been defendant's expectations, he is without remedy. In other words, there is no absolute engagement on plaintiffs' part to "want" and, of course, no absolute engagement to purchase any iron of the defendant.

Without such absolute engagement on plaintiffs' part, there is no "absolute mutuality of engagement," so that the defendant "has the right at once to hold" plaintiffs "to a positive agreement."

Upon these grounds we are of opinion that the testimony excluded was properly excluded, since it did not tend to establish a valid contract on the part of the defendant, and was therefore immaterial.

This case may be looked at from another point of view with like results. Plaintiffs' promise was the sole consideration for defendant's promise. To be a sufficient consideration it is necessary that plaintiffs' promise be a benefit to defendant, or an injury to plaintiffs. But so long as, for the reasons before given, plaintiffs are not bound to do anything by virtue of their promise, the promise cannot be such benefit or injury.

Judgment affirmed.

QUESTIONS

1. What was the nature of the offer which the defendant made to the plaintiffs in this case? Was it bilateral or unilateral?
2. Did not the defendant secure from the plaintiffs precisely the kind of an acceptance which was asked for? If so, why was there not a contract in this case?
3. The court said: "To be a sufficient consideration it is necessary that plaintiffs' promise be a benefit to defendant or an injury to plaintiffs." Assuming that these are true tests of the sufficiency of consideration, is it true that plaintiffs' promise was neither beneficial to the defendant nor detrimental to themselves?
4. D says to P: "I will sell you all the coal you may order this year at $4 a ton." P replies: "I accept your offer." Ten days later, D notifies P that he will not sell him coal during the year at any price less than $10 a ton. P sues D for a breach of the alleged contract. What decision?
5. D says to P: "I will sell you all the coal you may need in your business this year at $4 a ton." P says: "I will agree to buy from you all the coal I may need in my business this year at $4 a ton." (*a*) P sues D for his refusal to sell and deliver coal at $4 a ton. (*b*) D sues P for his refusal to buy coal at the price in question. What decision in each case?
6. D promises to convey Blackacre to P in consideration of P's promise to pay $5,000 for the land. Is this an enforcible agreement? What is the test of the enforcibility of such promises? Were such promises enforcible in the English law prior to 1550?
7. When D offers his promise for P's promise, what kind of contract is contemplated? When this kind of contract is contemplated, is it necessary that the promisee shall make an express promise? Will conduct or acts on his part, proving such a promise, be sufficient?
8. D gives his promise for P's promise. P is an infant. Is D's promise binding on him?
9. D gives his promise for W's promise. W is a married woman and at common law her promises are void. Is D's promise binding at common law?

10. D gives his promise for P's promise. P's promise, being orally given, is unenforcible because of the Statute of Frauds. Is D's promise binding?
11. D promises to make a suit of clothes for P, "to P's personal satisfaction." P agrees to pay D $50 for the suit. D refuses to make the suit. P sues him for breach of the alleged contract. D contends that his promise is not binding because P furnished no consideration for the promise. What decision?

LINGENFELDER *v.* WAINWRIGHT BREWING COMPANY

103 Missouri Reports 578 (1890)

GANTT, P. J. The referee found that Jungenfeld, the plaintiff's testator was not entitled to the commission of five per cent on the cost of the refrigerator plant. He found that Jungenfeld's employment as architect was to design plans and make drawings, specifications for certain brewery buildings for the Wainwright Brewery Company and superintend their construction to completion for a commission of five per cent on the cost of the buildings. He found further that Jungenfeld's contract did not include the refrigerator plant that was to be constructed in these buildings. He further found, and the evidence does not seem to admit of a doubt as to the propriety of his finding, that this refrigerator plant was ordered not only without Mr. Jungenfeld's assistance, but against his wishes. He was in no way connected with its erection.

"Mr. Jungenfeld was president of the Empire Refrigerating Company and largely interested therein. The De La Vergne Ice Machine Company was a competitor in business. Against Mr. Jungenfeld's wishes Mr. Wainwright awarded the contract for the refrigerating plant to the De La Vergne Company. The brewery was at that time in process of erection and most of the plans made. When Mr. Jungenfeld heard that the contract was awarded he took his plans, called off his superintendent on the ground, and notified Mr. Wainwright that he would have nothing more to do with the brewery. The defendant was in great haste to have its new brewery completed for divers reasons. It would be hard to find an architect in Mr. Jungenfeld's place and the making of new plans and arrangements when another architect was found would involve much loss of time. Under these circumstances Mr. Wainwright promised to give Jungenfeld 5 per cent on the cost of the De La Vergne ice machine if he would resume

work. Jungenfeld accepted and fulfilled the duties of superintending architect till the completion of the brewery.

"As I understand the facts and as I accordingly find, defendant promised Jungenfeld a bonus to resume work and complete the original contract under the original terms.

"I accordingly submit that in my view defendant's promise to pay Jungenfeld 5 per cent on the cost of the refrigerating plant was without consideration, and recommend that the claims be not allowed."

The referee also finds "that Mr. Jungenfeld never claimed that defendant had broken the contract or intended to do so, or that any of his legal rights had been violated."

The learned circuit judge, upon this state of facts, held that the defendant was liable on this promise of Wainwright to pay the additional 5 per cent on the refrigerator plant. The point was duly saved, and from the decision this appeal is taken.

Was there any consideration for the promise of Wainwright to pay Jungenfeld 5 per cent on the refrigerator plant? If there was not, plaintiff cannot recover the $3,449.75, the amount of that commission. The report of the referee, and the evidence upon which it is based, alike show that Jungenfeld's claim to this extra compensation is based upon Wainwright's promise to pay him this sum to induce him, Jungenfeld, to complete his original contract under its original terms.

It is urged upon us by respondents that this was a new contract. New in what respects? Jungenfeld was bound by his contract to design and supervise this building. Under the new promise he was not to do anything more or anything different. What benefit was to accrue to Wainwright? He was to receive the same service from Jungenfeld under the new that Jungenfeld was bound to tender under the original contract. What loss, trouble, or inconvenience could result to Jungenfeld that he had not already assumed? No amount of metaphysical reasoning can change the plain fact that Jungenfeld took advantage of Wainwright's necessities, and extorted the promise of 5 per cent on the refrigerator plant, as the condition of his complying with his contract already entered into. Nor had he even the flimsy pretext that Wainwright had violated any of the conditions of the contract on his part.

Jungenfeld himself put it upon the simple proposition that, "if he, as an architect put up the brewery, and another company put up the refrigerating machinery, it would be a detriment to the Empire

Refrigerating Company" of which Jungenfeld was president. To permit a plaintiff to recover under such circumstances would be to offer a premium upon bad faith, and invite men to violate their most sacred contracts that they may profit by their own wrong.

"That a promise to pay a man for doing that which he already under contract has to do is without consideration," is conceded by respondents. The rule has been so long imbedded in the common law and decisions of the highest courts of the various states that nothing but the most cogent reasons ought to shake it. *Harris* v. *Carter*, 3 E. & B. 55; *Stilk* v. *Myrick*, 2 Camp 317; 1 Chitty on Contracts (11 Amer. Ed.) 60; *Bartlett* v. *Wyman*, 14 Johns. 260; *Reynolds* v. *Nugent*, 25 Ind. 328; *Ayres* v. *Railroad*, 52 Iowa, 478; *Fosterman* v. *Parker*, 10 Ind. 474; *Eblin* v. *Miller*, 78 Ky. 371; *Sherwin & Co.* v. *Brigham*, 39 Ohio St., 137; *Overdoer* v. *Wiley*, 30 Ala. 709; *Jones* v. *Miller*, 12 Mo. 408; *Kick* v. *Morry*, 23 Mo. 72; *Laidlou* v. *Haich*, 75 Ill. 11; *Wimer* v. *Overseers of Poor*, 104 Penn St. 317; *Cobb* v. *Cowdery*, 40 Vt. 25; *Vanderbilt* v. *Schreyer*, 91 N.Y. 392.

But "it is carrying coal to Newcastle" to add authorities on a proposition so universally accepted and so inherently just and right in itself. The learned counsels for respondents do not controvert the general proposition. Their contention is, and the circuit court agreed with them, that when Jungenfeld declined to go further on his contract the defendant then had the right to sue for damages, and not having elected to sue Jungenfeld, but having acceded to his demand for the additional compensation, defendant cannot now be heard to say his promise is without consideration. While it is true Jungenfeld became liable in damages for the obvious breach of his contract, we do not think it follows that defendant is estopped from showing its promise was made without consideration.

It is true that as eminent a jurist as JUDGE COOLEY, in *Goebel* v. *Linn*, 47 Michigan 489, held that an ice company which had agreed to furnish a brewery with all the ice they might need for their business from November 8, 1879, until January 1, 1881, at $1.75 per ton, and afterwards in May, 1880, declined to deliver any more ice unless brewery would give it $3.00 per ton, could recover on a promissory note given for the increased price. Profound as is our respect for the distinguished judge who delivered that opinion, we are still of the opinion that his decision is not in accord with the most universally accepted doctrine and is not convincing, and certainly so much of the opinion as holds that the payment by a debtor of a part of his debt

then due would constitute a defence to a suit for the remainder is not the law of this State nor do we think of any other where the common law prevails.

The case of *Bishop* v. *Busse*, 69 Ill. 403, is readily distinguishable from the case at bar. The price of brick increased very considerably and the owner changed the plan of the building, so as to require nearly double the number; owing to the increased price and change in the plans, the contractor notified the party for whom he was building that he could not complete the house at the original prices, and, thereupon, a new arrangement was made, and it is expressly upheld by the court on the ground that the change in the buildings was such a modification as necessitated a new contract. Nothing we have said is intended as denying parties the right to modify their contracts, or make new contracts, upon new considerations and binding themselves there.

What we hold is that, when a party merely does what he has already obligated himself to do, he cannot demand an additional compensation therefor, and, although by taking advantage of the necessities of his adversary, he obtains a promise for more, the law will regard it as *nudum pactum*, and will not lend its process to aid in the wrong.

So holding, we reverse the judgment of the circuit court of St. Louis, to the extent that it allows the plaintiffs below, respondents here, the sum of $3,449.75, the amount of commission at 5 per cent, on the refrigerator plant.

QUESTIONS

1. What was the issue under consideration in the principal case? How was this issue decided? What rule of law can be deduced from the decision?
2. Did not Jungenfeld have the right to break this contract and pay damages instead? If so, why was his refraining from exercising the right not a sufficient consideration to support the promise of the Wainwright Brewing Company?
3. Could the parties have entirely rescinded the original agreement? Could they have then entered into a new agreement, containing a promise on the part of Wainwright to pay Jungenfeld 5 per cent commission on the cost of the refrigerating plant? Is this what took place in the principal case?
4. P is under a contract to build a house for D for the sum of $5,000. He threatens "to throw up the contract" because he realizes that he is

going to lose money on it. D promises him $500 in addition to the original sum if he will go ahead with the work. P finishes the building but D refuses to pay him more than $5,000. What are P's rights against D?

5. P promises to complete the building two days before the contract calls for its completion in consideration of D's promise to pay him the additional amount. P finishes the work in a satisfactory manner but D refuses to pay him the extra amount. P sues D for $500. What decision?
6. How is the case of *Bishop* v. *Busse*, 69 Illinois 403, cited in the opinion, distinguishable from the principal case?
7. D promises P, a constable, $10, if he will serve legal process on X. P does as requested and sues for the money. D contends that his promise is not binding because P was under an official duty to serve such processes. What decision?
8. D promised P, a fireman, $25 if he would rescue D's wife from a burning building. P rescues her as requested and sues D for $25. What decision?

JAFFRAY *v.* DAVIS

124 New York Reports 164 (1891)

POTTER, J. The facts found by the trial court in this case were agreed upon. They are simple and present a familiar question of law. The facts are that defendants were owing plaintiffs on the 8th day of December, 1886, for goods sold between that date and the May previous at an agreed price, the sum of $7,714.37, and that on the 27th of the same December, the defendants delivered to the plaintiffs their three promissory notes, amounting in the aggregate to three thousand four hundred and sixty-two and twenty-four one-hundredths dollars secured by a chattel mortgage on the stock, fixtures, and other property of defendants located in East Saginaw, Michigan, which said notes and chattel mortgage were received by plaintiffs under an agreement to accept same in full satisfaction and discharge of said indebtedness. "That said notes have all been paid and said mortgage discharged of record."

The question of law arising from these facts and presented to this court for its determination is whether such agreement, with full performance, constitutes a bar to this action, which was brought after such performance to recover the balance of such indebtedness over the sum so secured and paid.

One of the elements embraced in the question presented upon this appeal is, viz., whether the payment of a sum less than the amount

of a liquidated debt under an agreement to accept the same in satisfaction of such debt forms a bar to the recovery of the balance of the debt. This single question was presented to the English court in 1602, when it was resolved (if not decided) in *Pinnel's* case (5th Co. R. 117), "that payment of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole," and that this is so, although it was agreed that such payment should satisfy the whole. This simple question has since arisen in the English courts and in the courts of this country in almost numberless instances, and has received the same solution, notwithstanding the courts, while so ruling, have rarely failed, upon any recurrence of the question, to criticise and condemn its reasonableness, justice, fairness or honesty. No respectable authority that I have been able to find has, after such unanimous disapproval by all the courts, held otherwise than as held in *Pinnel's* case, *supra*, and *Cumber* v. *Wane*, 1 Str. 426; *Foakes* v. *Beer*, L. R. 9 App. Cas. 605; 36 English Reports, 194; *Goddard* v. *O'Brien*, L. R. 9 Q. B. Div. 37; Vol. 30, Am. Law Register, 637, and notes.

The steadfast adhesion to this doctrine by the *courts* in spite of the current of condemnation by the individual judges of the court, and in the face of the demands and conveniences of a much greater business and more extensive mercantile dealings and operations, demonstrates the force of the doctrine of *stare decisis*. But the doctrine of *stare decisis* is further illustrated by the course of judicial decisions upon this subject; for while the courts still hold to the doctrine of the *Pinnel* and *Cumber* v. *Wane* cases, *supra*, they have seemed to seize with avidity upon any consideration to support the agreement to accept the lesser sum in satisfaction of the larger, or in other words, to extract if possible from the circumstances of each case a consideration for the new agreement in place of the old, and thus to form a defense to the action brought upon the old agreement. It will serve the purpose of illustrating the adhesion of the court to settled law and at the same time enable us perhaps more satisfactorily to decide whether there was a good consideration to support the agreement in this case, to refer to the consideration, in a few of the numerous cases, which the courts have held to be sufficient to support the new agreement.

Lord Blackburn said in his opinion in *Foakes* v. *Beer*, *supra*, and while maintaining the doctrine, "that a lesser sum cannot be a satisfaction of a greater sum," "but the gift of a horse, hawk or robe, etc., in satisfaction is good," quite regardless of the amount of the debt.

And it was further said by him in the same opinion, "that payment and acceptance of a parcel before the day of payment of a larger sum would be a good satisfaction in regard to the circumstance of time," "and so if I am bound in twenty pounds to pay you ten pounds at Westminster, and you request me to pay you five pounds at the day at York, and you will accept it in full satisfaction for the whole ten pounds, it is a good satisfaction." It was held in *Goddard* v. *O'Brien* (L. R. 9 Q. B. Div. 37; 21 Am. L. Reg. N.S. 637) "A, being indebted to B in 125 pounds 7*s*. and 9*d*. for goods sold and delivered, gave B a check (negotiable I suppose) for 100 pounds payable on demand, which B accepted in satisfaction, was a good satisfaction." HUDDLESTONE, B., in *Goddard* v. *O'Brien*, *supra*, approved the language of the opinion in *Sibree* v. *Tripp* (15 M. & W. 26), "that a negotiable security may operate, if so given and taken, in satisfaction of a debt of a greater amount; the circumstance of negotiability making it in fact a different thing and more advantageous than the original which was not negotiable."

It was held in *Bull* v. *Bull* (43 Conn. 455), "and although the claim is a money demand liquidated and not doubtful, and it cannot be satisfied with a smaller sum of money, yet if any other personal property is received in satisfaction, it will be good no matter what the value."

And it was held in *Cumber* v. *Wane*, *supra*, that a creditor can never bind himself by simple agreement to accept a smaller sum in lieu of an ascertained debt of a larger amount, such agreement being *nudum pactum*, but if there be any benefit or even any legal possibility of benefit to the creditor thrown in, that additional weight will turn the scale and render the consideration sufficient to support the agreement.

It was held in *LePage* v. *McCrea* (1 Wend. 164), and in *Boyd* v. *Hitchcock* (20 Johns 76), that "giving further security for part of a debt or other security, though for a less sum than the debt, and acceptance of it in full of all demands, make a valid accord and satisfaction."

These cases in a striking manner show the extreme ingenuity and assiduity which the courts have exercised to avoid the operation of the "rigid and rather unreasonable rule of the old law," as it is characterized in *Johnston* v. *Brannan* (5 Johns. 268–272), or as it is called in *Kellogg* v. *Richards* (14 Wend. 116), "technical and not very well supported by reason," or as may be more practically stated, a rule

that "a bar of gold worth $100 will discharge a debt of $500, while 400 gold dollars in current coin will not." See note to *Goddard* v. *O'Brien, supra*, in Am. Law Register, New Series, Vol. 21, pp. 640 to 641.

In the case at bar the defendants gave their promissory notes upon time for one-half of the debt they owed plaintiffs, and also gave plaintiffs a chattel mortgage on the stock, fixtures, and other personal property of the defendants under an agreement with plaintiffs, to accept the same in full satisfaction and discharge of said indebtedness. Defendants paid the notes as they became due, and plaintiffs then discharged the mortgage. Under the cases above cited, and upon principle, this new agreement was supported by a sufficient consideration to make it a valid agreement, and this agreement was by the parties substituted in place of the former. The consideration of the new agreement was that the plaintiffs, in place of an open book account for goods sold, got the defendants' promissory notes, probably negotiable in form, signed by defendants, thus saving the plaintiffs perhaps the trouble or expense of proving their account, and got security upon all the defendants' personal property for the payment of the sum specified in the notes, where before they had no security.

It was some trouble at least, and perhaps some expense to the defendants to execute and deliver the security, and they deprived themselves of the legal ownership, or of any exemptions or the power of disposing of this property, and gave the plaintiffs such ownership as against the defendants, and the claims thereto of defendants' creditors if there were any.

In view of the peculiar facts in these two cases and the numerous decisions of this and other courts hereinbefore referred to, I do not regard them as authorities against the defendants' contention that the plaintiffs' action for the balance of the original debt is barred by reason of the accord and satisfaction, and that the judgment should be reversed with costs.

Judgment reversed.

QUESTIONS

1. What was the issue under consideration in the principal case? How was the issue decided? What rule of law can be deduced from the decision?
2. Can you offer any defense for the rule that the payment, or promise of payment, of a smaller sum of money by a debtor, is not a sufficient

consideration for a promise of the creditor to release the debtor from the payment of a larger sum then due? Can you offer any defense for a contrary rule?

3. D owes P $500 and the debt is due and payable. P says to D: "I will release you from the debt if you will pay me $300 now." D pays the money in accordance with P's request. Later, P brings an action against D for $200. D pleads in defense P's promise to release him from the debt. P replies that there was no consideration for his promise. What decision?
4. D gives P a horse worth about $250 which P accepts in satisfaction of the debt of $500. P sues D for $250, the balance of the original debt. What decision?
5. At P's request, D induces X to pay $300 to P, which P agrees to accept in satisfaction of the original debt. What decision in an action by P against D for $200?
6. D gives P a promissory note for $300 which P agrees to accept in satisfaction of the whole sum. What decision in an action by P against D for $200?
7. P owes $5,000 to a corporation in which D is interested. The corporation is unable to collect the money from P. D gives P his promissory note for $5,000 in consideration of P's paying $5,000 to the corporation which he already owed to it. P is suing D on the latter's note. D contends that there is no consideration for the note. What decision?

GOOD *v.* CHEESMAN

2 Barnewall and Adolphus' Reports 328 (1831)

Assumpsit by the plaintiff as drawer against the defendant as acceptor of two bills of exchange. Plea, the general issue. At the trial before LORD TENTERDEN, C. J., at the sittings in London after Trinity Term, 1830, it was proved on behalf of the defendant that after the bills became due and before the commencement of this action, the plaintiff and three other creditors of defendant met together in consequence of a communication from him, and signed the following memorandum: "Whereas William Cheesman of Portsea, brewer, is indebted to us for goods sold and delivered, and being unable to make an immediate payment thereof, we have agreed to accept payment of the same by his covenanting and agreeing to pay to a trustee of our nomination one third of his annual income, and executing a warrant of attorney as a collateral security until payment thereof. As witness our hands this 31st day of October, 1829." It did not appear whether or not the defendant was present when this

paper was signed, nor did he ever sign it; but it was in his possession at the time of the trial and he had procured it to be stamped. At the time of the signature, the defendant had other creditors than the four above mentioned, and particularly one Gloge, to whom he had given a warrant of attorney, on which judgment had been entered up; and it was agreed, at the meeting of the 31st of October, that if Gloge would come into the arrangement there made, an additional £20 per annum should be set apart by the defendant out of his income. The defendant on the 16th of November, 1829, wrote to plaintiff as follows: "If you should see Mr. Woolridge" (one of the creditors who signed) "today, I should be glad if you would endeavor to be at my house any noon that you may be down, as there is an objection to the arrangement by Mr. Gloge, the particulars of which I will explain when I see you. I am sorry to be so troublesome but, of course, I am anxious the thing should be settled." Gloge never acceded to the agreement, nor was any trustee ever nominated, or covenant entered into, or warrant of attorney executed as therein mentioned. The bills of exchange continuing wholly unpaid, this action was commenced. The Lord Chief Justice let it to the jury, as the only question of fact in the case, whether the agreement entered into by the four creditors was conditional only, depending on Gloge's assent, or absolute; in the latter case, he was of opinion that the defendant was entitled to a verdict. The jury found for the defendant, but leave was given to move to enter a verdict for the plaintiff. A rule nisi having been obtained accordingly.

LORD TENTERDEN, C. J. Upon the whole, I am of opinion that the verdict in this case was right. On the evidence it must be taken that the defendant assented to the composition, and would have been willing to assign a third of his income to a trustee nominated by the creditors and execute a warrant of attorney as required by the agreement; but he could not do so unless the creditors would appoint a trustee, to whom such assignment could be made or warrant of attorney executed. That no such appointment took place was the fault of the creditors, not of the defendant. It certainly appears that this was not an accord and satisfaction properly and strictly so called, but it was a consent by the parties signing the agreement to forbear enforcing their demands, in consideration of their own mutual engagement of forbearance; the defendant, at the same time, promising to make over a part of his income, and to execute a warrant of attorney which would have given the trustee an immediate right for their benefit.

Then is not this a case where each creditor is bound in consequence of the agreement of the rest? It appears to me that it is so, both on principle and on the authority of the cases in which it has been held that a creditor shall not bring an action, where others have been induced to join him in a composition, with the debtor; each party giving the rest reason to believe, that in consequence of engagement, his demand will not be enforced. This is, in fact, a new agreement, substituted for the orginal contract with the debtor; the consideration to each creditor being the engagement of the others not to press their individual claims.

LITTLEDALE, J. This is not strictly an accord and satisfaction or a release, but it is a new agreement between the creditor and debtor, such as might very well be entered into on a valid consideration. It was not necessary in this particular case that there should be an actual assignment, or execution of a warrant of attorney; if it only rested with the plaintiff and the other creditors that the contract would be carried into effect, and the defendant was always ready to do his part, it is the same as if he had actually executed an assignment or warrant of attorney. This case, therefore, is different from *Heathcote* v. *Crookshanks*, 2 T. R. 24. And it would be unjust that the plaintiff by this action should prejudice the other three creditors, each of whom signed the agreement, and has since neglected the recovery of his demand, under a persuasion that none of the parties to the memorandum would proceed against the defendant.

PARKE, J. I am of the opinion that the verdict was right. By the agreement entered into among these parties the defendant was to give, and the creditors to accept, certain securities for payment in the manner there stipulated; and upon the faith of that compromise the three creditors who signed with the plaintiff have postponed their demands. Then, cannot this transaction be pleaded in bar to the present suit? It is laid down in Com. Dig. Accord. (B. 4) that an accord with mutual promises to perform is good, though the thing be not performed at the time of action; for the party has a remedy to compel the performance, but the remedy ought to be such that the party might have taken it upon the mutual promise at the time of agreement. Here each creditor entered into a new agreement with the defendant, the consideration of which, to the creditor, was a forbearance by all the other creditors who were parties, to insist upon their claims. Assumpsit would have lain on either side to enforce performance of this agreement, if it had been shown that the

party suing had, as far as lay in him, fulfilled his own share of the contract. I think, therefore, that a mutual engagement like this, with an immediate remedy given for non-performance, although it did not amount to a satisfaction, was in the nature of it, and a sufficient answer to the action.

PATTESON, J. The question is whether or not this agreement was binding on the plaintiff. I think it was. The agreement was entered into by him on a good consideration, namely the undertaking of the other creditors who signed the paper at the same time with him, on the faith, which every one was induced to entertain, of a forbearance by all to the debtor.

Rule discharged.

QUESTIONS

1. What was the issue under consideration in the principal case? How was it decided? What rule of law can be deduced from the decision?
2. What consideration did the defendant furnish in this case which bound the creditors to the composition agreement?
3. D owes A, B, C, and E various sums of money. He cannot pay them all in full. A, B, C, and E propose to D: "If you will pay each of us 50 cents on the dollar, we, and each of us, will agree to release you from the payment of our several individual claims." D paid each the amount agreed upon. A brings an action against D for the balance of his original debt. D pleads in defense the composition agreement. A replies that there was no consideration for his promise. What decision?
4. D says that A's promise should be binding for at least one, if not for all, of the following reasons: (*a*) A received just what he bargained for. (*b*) A's promise is binding because of the mutual promises of the other creditors. (*c*) He, D, had given up his right to prefer creditors. (*d*) A's promise should be binding for reasons of commercial convenience. Comment on each reason advanced.
5. D and others sign the following subscription paper: "We, the undersigned, for and in consideration of each other's promise, agree to pay the several amounts set opposite our names, for the purpose of furnishing a free dinner to returned soldiers and sailors on July 4." (*a*) Before the committee had done anything, it receives a notice from D that he does not intend to pay the amount which he subscribed. (*b*) After the committee has incurred indebtedness in preparation for the dinner, it receives a similar notice from A, another subscriber. (*c*) After the dinner has been served, B, a third subscriber notifies the committee that he will not pay his subscription. (1) Who is promisee of these several promises? (2) What decisions in actions by the promisee against D, A, and B?

CALLISHER *v.* BISCHOFFSHEIM

Law Reports 5 Queen's Bench 449 (1870)

Declaration that the plaintiff had alleged that certain moneys were due and owing to him, to wit, from the government of Honduras, and from Don Carlos Guttierez and others, and had threatened and was about to take legal proceedings against the said government and persons to enforce payment of the same; and thereupon, in consideration that the plaintiff would forbear from taking such proceedings an agreed time, the defendant promised to deliver to the plaintiff certain securities, to wit, bonds, or debentures, called Honduras Railway Loan Bonds, for sums to the amount of 600 pounds immediately the bonds should be printed. Averment: that the plaintiff did not take any proceedings during the agreed period; and that all conditions had been fulfilled necessary to entitle him to sue in respect of the matters before stated. Breach: that the defendant had not delivered to the plaintiff the bonds or any of them. Plea: that at the time of making the alleged agreement no moneys were due and owing the plaintiff from the government and other persons.

Demurrer and joinder.

COCKBURN, C. J. Our judgment must be for the plaintiff. No doubt it must be taken that there was in fact no claim by the plaintiff against the Honduras government which could be prosecuted by legal proceedings to a successful issue; but this does not vitiate the contract and destroy the validity of what it alleged as the consideration. The authorities clearly establish that, if an agreement is made to compromise a disputed claim, forbearance to sue in respect of that claim is a good consideration; and whether proceedings to enforce the disputed claim have or have not been instituted makes no difference. If the defendant's contention were adopted, it would result that in no case of a doubtful claim could a compromise be enforced. Every day a compromise is effected on the ground that the party making it has a chance of succeeding in it; and if he *bona fide* believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration. When such a person forbears to sue he gives up what he believes to be a right of action, and the other party gets an advanatage; and, instead of being annoyed with an action, he escapes from the vexations incident to it. The defendant's contention is unsupported by authority.

It would be another matter if a person made a claim which he knew to be unfounded, and by a compromise derived an advantage under it: in that case his conduct would be fraudulent. If the pleas alleged that the plaintiff knew he had no real claim against the Honduras government, that would have been an answer to the action.

BLACKBURN, J. I am of the same opinion. The declaration, as it stands, in effect states that the plaintiff, having alleged that certain moneys were due to him from the Honduras government, was about to enforce payment, and the defendant suggested that the plaintiff's claim, whether good or bad, should stand over. So far, the agreement was a reasonable one. The pleas, however, alleges, that at the time of making the agreement no money was due. If we are to infer that the plaintiff believed that some money was due to him, his claim was honest, and the compromise of that claim would be binding and would form a good consideration, although the plaintiff, if he had prosecuted his original claim, would have been defeated. This case is decided by *Cook* v. *Wright*. In that case it appeared from the evidence that the defendant knew that the original claim of the plaintiff was invalid, yet he was held liable, as the plaintiff believed his claim to be good. The Court says that "the real consideration depends on the reality of the claim made, and the *bona fides* of the compromise." If the plaintiff's claim against the Honduras government was not *bona fide*, this ought to have been alleged in the pleas but no such allegation appears.

Judgment for the plaintiff.

QUESTIONS

1. What consideration did the plaintiff give to the defendant which rendered the promise of the defendant binding?
2. Does it appear that the plaintiff had any valid claim against the government of Honduras? What would have been the decision of the court in an action by the plaintiff against the government of Honduras?
3. P has a claim against D. The amount of the claim is in dispute. P says that it is $1,200. D says that it is $700. They mutually agree that $1,000 shall be taken as the amount due, which sum D pays P. Thereafter P brings an action against D, asking for $200. He offers evidence that the original claim was for $1,200. Is the evidence admissible?
4. P reasonably thinks that he has a claim against D and is threatening to bring suit on it. D promises $1,000 to P if he will promise not to bring suit. P makes the promise. This is an action by P against D for

$1,000. D contends that there was no consideration for his promise and offers evidence that P's original claim is groundless. Is the evidence admissible?

5. P reasonably thinks he has such a claim but D knows that he has not. What decision in an action by P against D?
6. P unreasonably believes that he has such a claim. What decision in an action by P against D?
7. P falsely asserts the claim for damages against D. What decision in an action by P against D?
8. D lives with W, a distant relative who is an aged woman of wealth. W has promised to leave all her property by will to D. W dies suddenly. If there is a will, her property will in all probability go to D. If there is no will, her property will pass by intestate succession to P, a niece of W. Neither P nor D knows whether there is a will. They enter into a written agreement that, will or no will, each shall have a half-interest in the property. Later, a will is found, leaving all the property to D. This is an action by P against D for a half-interest in the property. What decision?

STRONG *v.* SHEFFIELD

144 New York Reports 392 (1895)

This was an action upon a promissory note. The trial court gave judgment for the plaintiff. The general term reversed the judgment. The plaintiff appealed from this judgment.

ANDREWS, C. J. The contract between a maker or indorser of a promissory note and the payee forms no exception to the general rule that a promise, not supported by a consideration, is *nudum pactum*. The law governing commercial paper which precludes an inquiry into the consideration as against *bona fide* holders for value before maturity, has no application where the suit is between the original parties to the instrument. It is undisputed that the demand note upon which the action was brought was made by the husband of the defendant and indorsed by her at his request and delivered to the plaintiff, the payee, as security for an antecedent debt owing by the husband to the plaintiff. The debt of the husband was past due at the time, and the only consideration for the wife's indorsement, which is or can be claimed, is that as part of the transaction, there was an agreement by the plaintiff when the note was given, to forbear the collection of the debt, or a request for forbearance, which was followed by forbearance for a period of about two years subsequent to the giving of the note. There is no doubt that an agreement by

the creditor to forbear the collection of a debt presently due is a good consideration for an absolute or conditional promise of a third person to pay the debt, or for any obligation he may assume in respect thereto. Nor is it essential that the creditor should bind himself at the time to forbear collection or to give time. If he is requested by his debtor to extend the time, and a third person undertakes in consideration of forbearance being given to become liable as surety or otherwise, and the creditor does in fact forbear in reliance upon the undertaking, although he enters into no enforcible agreement to do so, his acquiescence in the request and an actual forbearance in consequence thereof for a reasonable time, furnishes a good consideration for the collateral undertaking. In other words, a request followed by performance is sufficient, and mutual promises at the time are not essential, unless it was the understanding that the promisor was not to be bound except on condition that the other party entered into an immediate and reciprocal obligation to do the thing requested. The general rule is clearly, and in the main accurately, stated in the note to *Forth* v. *Stanton* (1 Saund. 210, note *b*). The learned reporter says: "And in all cases of forbearance to sue, such forbearance must be either absolute or for a definite time, or for a reasonable time; forbearance for a little or for some time is not sufficient." The only qualification to be made is that in the absence of a specified time a reasonable time is held to be intended. (*Oldershaw* v. *King*, 2 H. & N. 517; *Calkins* v. *Chandler*, 36 Mich. 320.) The note in question did not in law extend the payment of the debt. It was payable on demand, although being payable with interest it was in form consistent with an intention that payment should not be immediately demanded, yet there was nothing on its face to prevent an immediate suit on the note against the maker or to recover the original debt.

In the present case the agreement made is not left to inference, nor was it a case of request to forbear, followed by forbearance, in pursuance of the request, without any promise on the part of the creditor at the time. The plaintiff testified that there was an express agreement on his part to the effect that he would not pay the note away, nor put it in any bank for collection, but (using the words of the plaintiff) "I will hold it until such time as I want my money, I will make a demand on you for it." And again, "No, I will keep it until such time as I want it." Upon this alleged agreement the defendant indorsed the note. It would have been no violation of the plaintiff's promise if, immediately on receiving the note, he had commenced

suit upon it. Such a suit would have been an assertion that he wanted the money and would have fulfilled the condition of the forbearance.

The debtor and the defendant, when they became parties to the note, may have had the hope or expectation that forbearance would follow, and there was forbearance in fact. But there was no agreement to forbear for a fixed time or for a reasonable time, but an agreement to forbear for such time as the plaintiff should elect. The consideration is to be tested by the agreement, and not by what was done under it. It was a case of mutual promise, and so intended. We think the evidence failed to disclose any consideration for the defendant's indorsement, and that the trial court erred in refusing so to rule.

The order of the General Term reversing the judgment should be affirmed, and judgment absolute directed for the defendant on the stipulation, with cost in all courts.

QUESTIONS

1. The plaintiff in the principal case was requested to forbear suing on the note and did forbear for a considerable period of time. Why was this forbearance held not to be a sufficient consideration to support the promise of the defendant?
2. What should the plaintiff have done to have fixed absolutely the liability of the defendant on the note?
3. P promises to forbear suing D on a note, due and payable, in consideration of D's promise to get X's signature on the note as a surety. X signs the note at D's request. Three days later, P sues D on the note. D pleads in defense the promise of P to forbear suit. P relies on two defenses: (*a*) that he did forbear suit for three days; (*b*) that there was no consideration for his promise to forbear suit. What decision?
4. P is pressing D for a claim which is due and payable. X promises P to pay interest on the claim if he will forbear suing D. P forbears suit for six months and brings an action against X for interest on the claim. X contends that there was no consideration for his promise to pay interest, because P never promised to forbear suit. What decision?

DUSENBURY *v.* HOYT

53 New York Reports 521 (1873)

Appeal from a judgment of the General Term of the Superior Court of the City of New York, affirming a judgment in favor of

defendant entered upon a verdict, and affirming an order denying a motion for a new trial.

The action was upon a promissory note. The defendant pleaded his discharge in bankruptcy. Upon the trial, after proof of the discharge, plaintiff offered to prove a subsequent promise of the defendant to pay the note. Defendant objected upon the ground that the action was upon the note, not upon the new promise. The court sustained the objection, and directed a verdict for defendant, which was tendered accordingly.

ANDREWS, J. The 34th Section of the Bankrupt Law declares that a discharge in bankruptcy releases the bankrupt from all debts provable under the act, and that it may be pleaded as a full and complete bar to all suits brought thereon.

The legal obligation of the bankrupt is by force of positive law discharged, and the remedy of the creditor existing at the time the discharge was granted to recover his debt by suit is barred. But the debt is not paid by the discharge. The moral obligation of the bankrupt to pay it remains. It is due in conscience, although discharged in law, and this moral obligation, uniting with a subsequent promise by the bankrupt to pay the debt, gives a right of action. It was held in *Shippey* v. *Henderson* (14 J. R. 178), that it was proper for the plaintiff, when the bankrupt had promised to pay the debt after his discharge, to bring his action upon the original demand, and to reply with the new promise in avoidance of the discharge set out in the plea. The Court, following the English authorities, said that the replication of the new promise was not a departure from the declaration, but supported it by removing the bar interposed by the plea, and that in point of pleading it was like the case where the defence of infancy or the Statute of Limitations, was relied upon. The case of *Shippey* v. *Henderson* was followed in subsequent cases, and the doctrine declared in it became, prior to the Code, the settled law. *McNair* v. *Gilbert*, 3 Wend. 344; *Wait* v. *Morris* 6 *id.* 39; *Fitzgerald* v. *Alexander*, 19 *id.* 402.

The question whether the new promise is the real cause of action, and the discharged debt the consideration which supports it, or whether the new promise operates as a waiver by the bankrupt of the defence which the discharge gives him against the original demand has occasioned much diversity of judicial opinion. The former view was held by MARCY, J., in *Depuy* v. *Swart* (3 Wend. 139), and is probably the one best supported by authority. But after as before

the decision in that case, the Court held that the original demand might be treated as the cause of action, and for the purpose of the remedy, the decree in bankruptcy was regarded as a discharge of the debt *sub modo* only, and the new promise as a waiver of the bar to the recovery of the debt created by the discharge. We are of the opinion that the rule of pleadings, so well settled and so long established, should be adhered to. The original debt may still be considered the cause of action for the purpose of the remedy. The objection that, as no replication is now required, the pleadings will not disclose the new promise is equally applicable where a new promise is relied upon to avoid the defence of infancy or the Statute of Limitations, and in those cases the plaintiff may now, as before the Code, declare on the original demand.

The offer of the plaintiff to prove an unconditional promise by the defendant, after his discharge to pay the debt, was improperly overruled, and the judgment should, for this reason, be reversed, and a new trial ordered, with costs to abide the event.

Judgment reversed.

QUESTIONS

1. What was the issue under consideration in this case? How was the issue decided? What rule of law can be deduced from the decision?
2. Was there a consideration for the defendant's promise to pay the debt? If so, what was it?
3. Was the action brought on the original debt or on the new promise?
4. D owes P a sum of money, action for which is barred by the Statute of Limitations. P sues D for the money, proving that after the running of the statute the defendant made a new promise to pay the debt. The defense contends that there is no consideration for the promise. What decision?
5. D, while an infant, purchased a horse from P. The horse died before D became of age. At that time D informed P that he did not intend to pay for the horse. D made a new promise to pay after he reached his majority. What are the rights of P, if any, against D?
6. P painted D's barn without the knowledge or request of the latter. D later promised to pay P $100 for his services. P sues D for the amount promised. What decision?
7. D requested P to paint his barn but said nothing about compensation for the services. After the barn was painted, D promised to pay P $100. What are the rights of P, if any, against D?

3. Defective Agreements

a) Agreements within the Statute of Frauds

Act of 29 Charles II, 1676, Chapter 3

IV. And be it further enacted by the authority aforesaid, that from and after the said four and twentieth day of June, no action shall be brought (1) whereby to charge any executor or administrator upon any special promise, to answer damage out of his own estate; (2) or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person; (3) or to charge any person upon any agreement made upon consideration of marriage; (4) or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; (5) or upon any agreement that is not to be performed within the space of one year from the making thereof; (6) unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

XVII. And be it further enacted by the authority aforesaid, that from and after the said four and twentieth day of June no contract for the sale of any goods, wares or merchandise, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.

QUESTIONS

1. Why is this enactment called the Statute of Frauds? When was it passed? Who was the author of it?
2. How does the Statute of Frauds prevent frauds and perjuries? Has it increased or decreased litigation?
3. What classes of contracts are required by the Statute to be in writing? Why should these classes of contracts be reduced to writing? Would it not have been good policy to have required that all contracts be reduced to writing?
4. Examine the statutes of some state in which you are interested and make a brief digest of its Statute of Frauds.

PURNER *v.* PIERCY

40 Maryland Reports 212 (1874)

By parol contract, the plaintiff agreed to sell to the defendant, and the defendant agreed to purchase from the plaintiff, the peaches then growing in the peach orchard of the plaintiff, for a specified sum, the defendant to gather and remove the peaches as they matured. The defendant or his agent at the time of the purchase, paid the plaintiff a portion of the purchase money, and a further portion before any peaches were gathered, and gathered said peaches from the orchard as they matured, and removed the same. The plaintiff brought his action for the balance of the purchase price. Verdict and judgment were given for the plaintiff and the defendant prosecuted this appeal.

STEWART, J. But the defendant insists that the contract was invalid under the operation of the 4th section of the Statute of Frauds. That section provides that no action shall be brought to charge any person upon any contract or sale of lands, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum thereof, shall be in writing.

Agreement and contract seem to be considered in the section of the same purport, and the appellant insists the contract or agreement relied upon here to charge the defendant, is for lands, or some interest in or concerning them, and, therefore, not to be established by parol proof.

It would be giving to the Statute a very latitudinarian construction to bring the case in question within the mischief designed to be avoided by the Statute.

There is certainly some conflict in the adjudged cases in regard to the interpretation of contracts for the sale of crops and the natural products growing upon land; and it is difficult to deduce therefrom any clearly defined rule upon the subject.

Mr. Benjamin in his recent work on Sales, 84 *et seq.*, remarks that the law on the subject may be summed up in the following proposition: growing crops, if *fructus industriales*, are chattels, and an agreement for the sale of them, whether mature or immature, whether the property in them is transferred before or after severance, is not an agreement of the sale of any interest in land, and is not governed by the 4th section of the Statute of Frauds. Growing crops, if *fructus naturales*, are a part of the soil before severance, and an agreement,

therefore, vesting an interest in them in the purchaser before severance, is governed by the 4th section; but if the interest is not to be vested till they are converted into chattels by severance, then the agreement is an executory agreement for the sale of goods, wares and merchandise, governed by the 17th, and not by the 4th, section of the Statute.

Assuming these distinctions to be well founded, still what is the natural and what is the artificial product remains to be determined in each case. Mr. Phillips, in his work on evidence says, "the Statute does not include agreements for the sale of the produce of a given quantity of land, and which will afterwards become a chattel; though some advantage may accrue to the vendee by its continuing for a time in the land."

In Taylor's recent book on *The Law of Evidence*, 2nd vol., sec. 952, the following propositions are submitted: 1st. A contract for the purchase of fruits of the earth, ripe, though not yet gathered, is not a contract for any interest in lands, though the vendee is to enter and gather them. 2nd. A sale of any growing produce of the earth, reared annually by labor and expense, and in natural existence, at the time of the contract, as for instance a growing crop of corn, hops, potatoes, or turnips, is not within the 4th section, though the purchaser is to harvest or dig them. 3rd. An agreement respecting the sale of a growing crop of fruit, or grass, or of standing underwood, growing poles or timber, is within the 4th section, and a written contract of sale cannot be dispensed with.

However sound his 1st and 2nd propositions, we think his 3rd is to be taken with some qualification and that a growing crop of peaches or other fruit, requiring periodical expense, industry and attention, in its yield and production, may well be classed as *fructus industriales* and not subject to the 4th section of the Statute.

Judgment affirmed.

QUESTIONS

1. What was the issue under consideration in the principal case? How was the issue decided? What rule of law can be deduced from this decision?
2. The court said that the agreement in this case was governed by the seventeenth section of the Statute of Frauds. How are the requirements of the seventeenth section met by the agreement in question?
3. What are *fructus naturales? Fructus industriales?*

4. D agrees to sell and P to buy all the corn on a certain tract of land owned by D. P pays $25 to D in part payment of the purchase price. It is understood that P is to gather the corn when it matures. P sues D for damages, proving that D refused to allow him to gather the corn at harvest. D contends that the agreement is for the sale of an interest in land and not enforcible under the Statute of Frauds because it is not in writing. What decision?
5. In the foregoing case, D admits that the agreement is for the sale of goods, wares, and merchandise, but contends that the requirements of the seventeenth section of the Statute of Frauds are not met by the agreement. What decision?
6. D agrees to sell and P to buy for $500 all the timber growing on a certain tract of land owned by D. It is further agreed that P may enter the land, cut the timber, and haul it away. When P comes to cut the timber, D refuses him permission to go on the land. D pleads the Statute of Frauds in an action by P against him. What decision?
7. D agrees to sell and P to buy for $500 all the timber growing on a certain tract of land. P pays $50 to D in part payment of the purchase price. It is agreed between them that title to the timber shall not pass until the timber is cut. P sues D for breach of the alleged agreement. D pleads the Statute of Frauds. What decision?
8. P, at D's special request and according to his specifications, agrees to manufacture an automobile for D. D agrees to pay $4,500 for it when it is completed. P sues D for his refusal to accept and pay for the machine when completed. D pleads the Statute of Frauds. What decision?

BOWMAN *v.* WADE

54 Oregon Reports 347 (1909)

The plaintiff brought his action against Henry Wade, to recover money loaned to defendant, alleging substantially: That in January of 1903, he loaned him the sum of $300; that, when the same became due in April following, defendant solicited an additional loan of $700; that on April 18th, of that year, plaintiff loaned him the further sum of $700 upon an agreement that the whole amount of $1,000 would stand as a loan for three years from that date and should bear 10 per cent interest; that no part thereof, principal or interest, had been repaid. Trial was had, resulting in a verdict and judgment for plaintiff in the sum of $1,000 at 6 per cent, and an order to sell the attached property, from which the defendant appealed.

SLATER, J. The first assignment of error relied upon by defendant for a reversal of the judgment is based upon the admission, over his

objection and exception, of the parol testimony of the plaintiff of the circumstances of the making of the loan and defendant's agreement to repay the money three years after the date of the transaction. The substance of the objection is that the contract upon which the action is founded is one which was not by its terms to be performed within the space of one year from the making thereof, and is within subdivision 1, Section 797, B. & C. Comp., commonly designated as the "Statute of Frauds." It appears from the testimony that no note or memorandum of the contract, expressing consideration, was made in writing subscribed by the defendant, and if the agreement is within the statute, as claimed by the defendant, it could not be established by parol testimony in an action to recover on such contract.

There is much disagreement among the authorities as to whether or not a complete performance of an agreement upon one side at the time of its making, the performance of which by the other party is not to take place within a year, will take the case out of the statute. It is said that the adjudicated cases are incapable of reconciliation on principle, but that the decided preponderance of authority is in favor of the validity of a parol contract which has been fully performed upon one side at or near the time of its making, although the execution thereof by the other party is deferred for a longer period than one year. Smith, *Law of Fraud*, Sec. 352. And especially is this the case where the stipulation sought to be enforced related solely to the payment of a money consideration. In such cases it is a mere point of form in bringing the action; the plaintiff's right to recover on the *indebitatus assumpsit* being clear. Browne, *Statute of Frauds* (5 ed.) Sec. 290; *Pierce* v. *Paine's Estate*, 28 Vt. 34; *Emery* v. *Smith*, 46 N.H. 151; *Durfee* v. *O'Brien*, 16 R.I. 213 (14 Atl. 857). A full citation and review of the authorities on both sides of this controverted question may be found in an extended footnote to section 352 on pages 436–447 of Mr. Smith's recent work on the *Law of Fraud*. After a careful perusal thereof, we are of the opinion that on principle and weight of authority the contract now under consideration is not within the statute. We are brought to this conclusion chiefly by what was said in *McClellan* v. *Sanford*, 26 Wis. 595. After stating the principle there involved—which is substantially the same as here—and the attitude of the authorities thereon, Mr. Chief Justice DIXON says: "It will be observed, on examining these cases, that in some the question was nearly identical with the present, except that the promise was not evidenced by anything written in the deed, and that in all

it was held that a verbal promise to pay beyond the year, if made upon an executed consideration, whether lands conveyed or goods and chattels sold and delivered, or other consideration of value, is valid. The doctrine of these cases is that the provision of the statute now being considered applies only to contracts not to be performed on either side within one year. The cases holding to the opposite rule that, whilst they adhere to a strict and literal construction of the statute in order to close the door to the mischiefs which they suppose the statute was designed to prevent by excluding parol evidence after the lapse of one year, they yet seem to leave the door wide open to the same mischiefs by allowing parol evidence to be introduced to show what the contract was, and what was the price or sum agreed to be paid, for the purpose of enabling the promisee or creditor to recover upon a *quantum meruit* or *quantum valebat*. The advantage of this course of decision is not perceived, and, if it were, we should not be inclined to depart from a rule already laid down, especially when it is sustained by so much and such respectable authority." Substantially the same principle is stated in *Durfee* v. *O'Brien*, 16 R.I. 213 that "If the recovery be upon a *quantum meruit* count, still the contract is admissible as evidence to show what the defendant admitted and declared the consideration to be worth."

It is conceded by counsel for defendant that, if plaintiff in fact loaned the money to defendant upon the terms stated in the complaint—which we must assume that the jury found—and that if it were held to be within the statute yet he may recover, not upon the contract, but for money had and received, if the complaint be so framed; and this is undoubtedly held by many authorities, including *Keller* v. *Bley*, 15 Or. 433 (15 Pac. 705); *Pierce* v. *Paine's Estate*, 28 Vt. 34; *Swift* v. *Swift*, 46 Cal. 266; *Moody* v. *Smith*, 70 N.Y. 598; *Whipple* v. *Parker*, 29 Mich. 369; *Bennett* v. *Phelps*, 12 Minn. 326 (Gil. 216). The complaint states the fact of plaintiff's having paid the money to the defendant, and the purpose for which it was done, which negatives that the payment was made to liquidate any liability or obligation which the former owed to the latter, or that it was intended as a gift. Under such circumstances the law imposes an obligation to repay the same within a reasonable time, with legal interest. The verdict and judgment are for such an amount, and not for the amount of interest contracted to be paid. In our opinion the evidence was admissible and in any view of the case there was no prejudicial error in admitting it.

The motion for a directed verdict involves the same theory of the defense, and it was therefore properly denied.

QUESTIONS

1. What rule of law does the principal case lay down? Does it seem to be in keeping with the spirit of the Statute of Frauds?
2. Suppose that the court had held that the agreement in question was unenforcible because it was not in writing, would the plaintiff have had any remedy against the defendant for the return of his money?
3. D sells out his business to P, and orally agrees not to re-engage in the same kind of business, in the same town, for a period of five years. P sues D for a breach of the contract. D pleads the Statute of Frauds. What decision?
4. The D Company orally contracts to maintain a railway switch for P's convenience as long as he shall need it. P sues the company for its refusal to keep up the switch. The company pleads the Statute of Frauds. What decision?
5. P and D enter into a contract of employment for a period of three years. It is expressly agreed that either may terminate the agreement sooner upon giving the other thirty days' notice. P sues D for terminating the agreement without giving him the required notice. D pleads the Statute of Frauds. What decision?
6. D was tenant of P, under a lease of twenty years. He orally agreed to pay an additional $25 a year for the remainder of the term of the lease in consideration of P's promise to lay out $250 in repairs on the premises. P performed but D refused to pay the additional rent. P sues D on his promise. D pleads the Statute of Frauds. What decision?

BIRD *v.* MUNROE

66 Maine Reports 337 (1877)

PETERS, J. On March 2, 1874, at Rockland, in this state, the defendant contracted verbally with the plaintiffs for the purchase of a quantity of ice, to be delivered (by immediate shipments) to the defendant in New York. On March 10, 1874, or thereabouts, the defendant by want of his readiness to receive a portion of the ice as he had agreed to, temporarily prevented the plaintiffs from performing the contract on their part according to the preparations made by them for the purpose. On March 24, 1874, the parties then in New York put their previous verbal contract in writing, antedating it as an original contract made at Rockland on March 2, 1874. On the

same day, March 24, by consent of the defendant, the plaintiffs sold the same ice to another party, reserving their claim against the defendant for damages sustained by them by the breach of the contract by the defendant on March 10 or about that time. This action was commenced on April 11, 1874, counting on the contract as made on March 2, and declaring for damages sustained by the breach of contract on March 10, or thereabouts and prior to March 24, 1874.

The defendant contends that, even if the writing as signed by the parties was intended by them to operate retroactively as of the first named date, as a matter of law, it cannot be permitted to have that effect and meet the requirements of the Statute of Frauds. The position of the defendant is, that all which took place between the parties before March 24 was in the nature of negotiations only; and that there was no valid contract, such as is called for by the Statute of Frauds, before that day; and that the action is not maintainable, because the breach of contract is alleged to have occurred before that day. The plaintiffs, on the other hand, contend that the real contract was made verbally on March 2, and that the written instrument is sufficient proof to make the verbal contract as of that date, March 2, although the written proof was not made out until twenty-two days after that time. Was the valid contract, therefore, made on March 2, or March 24? The point raised is, whether, in view of the Statute of Frauds, the writing in this case shall be considered as constituting the contract itself or at any rate any substantial portion of it, or whether it may be regarded as merely necessary legal evidence by which the prior unwritten contract may be proved. In other words, is the writing the contract or only evidence of it? We incline to the latter view.

The peculiar wording of the statute presents a strong argument for such a determination. The section reads: "No contract for the sale of any goods, wares or merchandise, for thirty dollars or more, shall be valid, unless the purchaser accepts and receives part of the goods, or gives something in earnest to bind the bargain, or in part payment thereof, or some note or memorandum thereof is made and signed by the party to be charged thereby, or by his agent." In the first place, the statute does not go to all contracts of sale, but only to those where the price is over a certain sum. Then, the requirement of the statute is in the alternative. The contract need not be evidenced by writing at all, provided "the purchaser accepts and receives a part of the goods, or gives something in earnest to bind the

bargain or in part payment thereof." If any one of these circumstances will as effectually perfect the sale as a writing would, it is not easily seen how the writing can actually constitute the contract, merely because a writing happens to exist. It could not with any correctness be said that anything given in earnest to bind a bargain was a substantial part of the part of the bargain itself, or anything more than a particular mode of proof. Then, it is not the contract that is required to be in writing, but only some "note or memorandum thereof." This language supposes that the verbal bargain may be first made, and a memorandum of it given afterward. It also implies that no set and formal agreement is called for. Chancellor Kent says "the instrument is liberally construed without regard to forms." The briefest possible forms of a bargain have been deemed sufficient in many cases. Certain important elements of a completed contract may be omitted altogether. For instance, in this state, the consideration for the promise is not required to be expressed in writing. Again, it is provided that the note or memorandum is sufficient, if signed only by the person to be charged. One party may be held thereby and the other not be. Still, if the writing is to be regarded in all cases as constituting the contract, in many cases there would be but one contracting party.

But the defendant contends that this course of reasoning would make a memorandum sufficient if made after action brought, and that the authorities do not agree to that proposition. There has been some judicial inclination to favor the doctrine to that extent even, and there may be some logic in it. Still the current of decisions requires that the writing must exist before action brought. And the reason for the requirement does not militate against the idea that a memorandum is only evidence of the contract. There is no actionable contract before the memorandum is obtained. The writing is a condition precedent to the right to sue. WILLES, J., perhaps correctly describes it in *Gibson* v. *Holland*, L. R. 1 C. P. 1, when he says, "the memorandum is in some way to stand in the place of the contract." He adds: "The courts have considered the intention of the legislature to be of a mixed character to prevent persons from having actions brought against them so long as no written evidence was existing when the action was instituted." In *Philbrook* v. *Belknap*, 6 Vt. 383 it is said, "strictly speaking, the statute does not make the contract void, except for the purpose of sustaining an action upon it, to enforce it."

Action to stand for trial.

QUESTIONS

1. What was the issue under consideration in the principal case? How was the issue decided? What rule of law can be deduced from this decision?
2. What would have been the decision in this case had the defendant given this memorandum after the plaintiff had instituted his action?
3. P is suing D for breach of a contract to sell stock and offers in evidence the following memorandum: "This day sold ten shares of stock. (Signed) D." D objects that the memorandum is not sufficient. What decision?
4. P offers in evidence the following memorandum to prove a contract of sale: "Dear Sir: I have this day sold you ten shares of stock in the X Corporation for $10,000. (Signed) D." D contends that the memorandum is not sufficient to prove the contract. What decision?
5. P offers in evidence the following memorandum to prove a contract with D: "I have this day sold P ten shares of stock in the X Company for $10,000. (Signed) A." He also offers parol evidence that the contract was made by A for P. What decision?
6. P sues D for breach of a contract to sell and offers in evidence the following memorandum to prove the contract: "Sold to P ten horses for $5,000. (Signed) D." What decision?
7. In the foregoing case, D is suing P for his refusal to accept and pay for the horses. What decision?
8. What kind of signature is required by the Statute of Frauds for a sufficient memorandum? Suppose that it is printed? Written with a pencil? Suppose that the signature of the party sought to be charged is at the top of the memorandum? May an agent sign such a memorandum for his principal? May an agent of one party to the agreement sign for both? May one of the parties sign for both?
9. What terms must be included in the memorandum? Must the consideration for the promise sued on appear in the writing?

b) Illegal Agreements

SWEENEY *v.* FRANKLIN FIRE INSURANCE CO.

20 Pennsylvania State Reports 337 (1853)

This was an action of covenant by *John Sweeney* v. *The Franklin Fire Insurance Company of Philadelphia*, upon a policy of insurance. The declaration was in the usual form, and the defendants, among other pleas, pleaded that the plaintiff was not interested in the building insured; that, at the time of the insurance, the plaintiff had repre-

sented himself as owner of the said building in consequence of which the insurance was effected, when, in reality, he was not owner, etc.; and that the building insured was misdescribed.

On these pleas, issues in fact were duly joined. At the trial, on the 19th of February, 1852, it was agreed that any point as to a material misrepresentation or concealment, might be raised under the pleadings as they stood.

The verdict of the jury was rendered in favor of the plaintiff, for $2,880, the judge reserving the point whether, upon the whole evidence the plaintiff had a right to recover.

Afterward the Court ordered the verdict to be set aside and judgment of non-suit to be entered.

LOWRIE, J. The rule is valuable and well founded, that, he who has no interest can have no insurance. That he must show his interest, and that it is the extreme measure of his recovery, are the corollaries of the rule. Without this, insurances would soon become a mere system of gambling. These principles are sufficient to affirm the judgment.

It matters not what contracts or conveyances passed between the plaintiff and the company by which this house was erected. The company had no title to convey to him. So far as the evidence of title goes, it shows that the company entered upon land belonging to the state of Delaware, and erected their house there without any shadow of title or even of license, general or special. They were mere intruders, and if the plaintiff has their whole title, it is a mere intruder's title. This is not such an interest as the law recognizes as a sufficient foundation for the contract of insurance.

Judgment affirmed.

QUESTIONS

1. What was the issue under consideration in the principal case? How was the issue decided? What rule of law can be deduced from this decision?
2. Suppose that the land on which the insured building stood had belonged to a private individual, would the decision in this case have been the same?
3. Why must one who contracts for insurance have an insurable interest in the thing insured?
4. D says to P: "I will give you $100 if X is elected to the presidency of the United States, if you will promise me the same amount in case he is not elected." P accepts the offer. X is elected to the office in question. P sues D for $100. What decision?

QUESTIONS

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2. What would have been the decision in this c… this memorandum after the plaintiff had …
3. P is suing D for breach of a contract t… the following memorandum: "Th… (Signed) D." D objects that … What decision?
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5. P offers in evidence … with D: "I have … for $10,000. (S… contract was m…
6. P sues D for … following m… for $5,000…
7. In the fo… the hor…
8. What … suffic… a p… ch… su… t…
9. …

…burn this year, …ccepts the offer. …sues D for $5,000.

…pay you $25 this year if …e my house burns." The …burns during the year in ques-…

…e owned by X. (*b*) P mortgages a …ct to buy a house and lot from Z. (*d*) P …house and lot which he owns to D. (*e*) D, …promised to leave the property to P by will. …property belonging to D and has been holding …for four years. In which of the foregoing cases …interest in the property?

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ESTATE OF TAYLOR & CO.

192 Pennsylvania State Reports 304 (1899)

The case arose on exceptions to an auditor's report. The auditor *reported on the* claim of William H. Howard as follows:

H. C. Todd presented the claim of William H. Howard for *$11,921.62.* Mr. Howard is a capitalist and a farmer. On March *13, 1893,* he bought 100 shares of Lehigh Coal and Navigation Com*pany for $4,337.50,* and the next day paid L. H. Taylor & Company *$2,000.* During the month of April, 1893, he appears to have ordered, *bought and sold* about 1,200 shares of stock. On April 30, 1893, he *ordered sold* "short" 100 shares of Baltimore and Ohio Railroad *Company* and 100 shares of Philadelphia, Reading and New England *Railroad Company.* On July 31, 1895, he owed Taylor & Company *$50,161.61.* In November, 1895, he again turned "bear," selling "short" in that single month 500 shares of Reading Railway Com*pany,* 200 shares of American Tobacco Company, 100 shares of American Sugar Refining Company, common, and 100 shares of Welsbach Light Company. In December, 1895, he also made short sales of Welsbach Light Company and American Sugar Refining Company, common. The account had been closed in 1893, but was

No stock was delivered to him after March 31, ' was reopened. He testified that he did not ⁻count, however, including his enormous ·ks of a gaming transaction, and I so

ıled by this court so often that it ıhat dealing in stock even on margins .e as legitimate subjects of speculative .r or dry goods or pig iron. A man may buy ĸ included, to sell on an expected rise or sell ċ and deliver on an expected fall, and it will not be .rgin is nothing but security, and a man may buy on . security or without, or on borrowed money, and the .ay be borrowed from his broker as well as from a third person. .est is, did he intend to buy, or only to settle on differences? ne had bought and paid for his stock, held it for a year and then sold, no one would call it gambling and yet it is just as little so, if he had it but an hour and sold before he had in fact paid for it. And so with selling. Every merchant who sells you something not yet in his stock which he undertakes to get for you, is selling "short," but he is not gambling, because though delivery is to be in the future, the sale is present and actual. The true line of distinction was laid down in *Peters* v. *Grim*, 149 Pa. 163, and has not been departed from or varied, "A purchase of stock for speculation, even when done merely on margin, is not necessarily a gambling transaction. If one buys stock from A and borrows money from B to pay for it, there is no element of gambling in the operation, though he pledges the stock with B as security for the money. So, if instead of borrowing money from B, a third person, he borrows it from A or, in the language of brokers, procured A to 'carry the stock for him, with or without margin,' the transaction is not necessarily different in character. But in this latter case, there being no transfer or delivery of the stock, the doubt arises whether the parties intended there should ever be a purchase and delivery at all. Here is the dividing line. If there was not under any circumstances to be a delivery, as part of and completing a purchase, then the transaction was a mere wager on the rise and fall of prices; but if there was in good faith a purchase, then the delivery might be postponed, or made to depend on a future condition, and the stock carried on margin or otherwise in the meanwhile, without affecting the legality of the operation." And the rule goes so far that an

5. P says to D: "I will give you $25 if X's house does not burn this year, if you will promise me $5,000 in case it does." D accepts the offer. The house burns during the year in question. P sues D for $5,000. What decision?
6. P says to the D Insurance Company: "I will pay you $25 this year if you will agree to pay me $5,000 in case my house burns." The company accepts the offer. The house burns during the year in question. P sues the company for $5,000. What decision?
7. (*a*) P holds a mortgage on a house owned by X. (*b*) P mortgages a house to Y. (*c*) P has a contract to buy a house and lot from Z. (*d*) P is under a contract to sell a house and lot which he owns to D. (*e*) D, owner of a house and lot, has promised to leave the property to P by will. (*f*) P is in possession of property belonging to D and has been holding adverse possession of it for four years. In which of the foregoing cases does P have an insurable interest in the property?
8. Does the doctrine of insurable interest apply to life insurance? Does it apply to maritime insurance?
9. What constitutes an insurable interest in the life of another person?

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reopened thereafter. No stock was delivered to him after March 31, 1893, when the account was reopened. He testified that he did not intend to gamble. The account, however, including his enormous short sales has all the earmarks of a gaming transaction, and I so find it. I disallow the claim.

MITCHELL, J. It has been settled by this court so often that it ought not to require reiteration that dealing in stock even on margins is not gambling. Stocks are as legitimate subjects of speculative buying and selling as flour or dry goods or pig iron. A man may buy any commodity, stock included, to sell on an expected rise or sell "short" to acquire and deliver on an expected fall, and it will not be gambling. Margin is nothing but security, and a man may buy on credit, with security or without, or on borrowed money, and the money may be borrowed from his broker as well as from a third person. The test is, did he intend to buy, or only to settle on differences? If he had bought and paid for his stock, held it for a year and then sold, no one would call it gambling and yet it is just as little so, if he had it but an hour and sold before he had in fact paid for it. And so with selling. Every merchant who sells you something not yet in his stock which he undertakes to get for you, is selling "short," but he is not gambling, because though delivery is to be in the future, the sale is present and actual. The true line of distinction was laid down in *Peters* v. *Grim*, 149 Pa. 163, and has not been departed from or varied, "A purchase of stock for speculation, even when done merely on margin, is not necessarily a gambling transaction. If one buys stock from A and borrows money from B to pay for it, there is no element of gambling in the operation, though he pledges the stock with B as security for the money. So, if instead of borrowing money from B, a third person, he borrows it from A or, in the language of brokers, procured A to 'carry the stock for him, with or without margin,' the transaction is not necessarily different in character. But in this latter case, there being no transfer or delivery of the stock, the doubt arises whether the parties intended there should ever be a purchase and delivery at all. Here is the dividing line. If there was not under any circumstances to be a delivery, as part of and completing a purchase, then the transaction was a mere wager on the rise and fall of prices; but if there was in good faith a purchase, then the delivery might be postponed, or made to depend on a future condition, and the stock carried on margin or otherwise in the meanwhile, without affecting the legality of the operation." And the rule goes so far that an

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MITCHELL, J. It has been settled by this court so often that it ought not to require reiteration that dealing in stock even on margins is not gambling. Stocks are as legitimate subjects of speculative buying and selling as flour or dry goods or pig iron. A man may buy any commodity, stock included, to sell on an expected rise or sell "short" to acquire and deliver on an expected fall, and it will not be gambling. Margin is nothing but security, and a man may buy on credit, with security or without, or on borrowed money, and the money may be borrowed from his broker as well as from a third person. The test is, did he intend to buy, or only to settle on differences? If he had bought and paid for his stock, held it for a year and then sold, no one would call it gambling and yet it is just as little so, if he had it but an hour and sold before he had in fact paid for it. And so with selling. Every merchant who sells you something not yet in his stock which he undertakes to get for you, is selling "short," but he is not gambling, because though delivery is to be in the future, the sale is present and actual. The true line of distinction was laid down in *Peters* v. *Grim*, 149 Pa. 163, and has not been departed from or varied, "A purchase of stock for speculation, even when done merely on margin, is not necessarily a gambling transaction. If one buys stock from A and borrows money from B to pay for it, there is no element of gambling in the operation, though he pledges the stock with B as security for the money. So, if instead of borrowing money from B, a third person, he borrows it from A or, in the language of brokers, procured A to 'carry the stock for him, with or without margin,' the transaction is not necessarily different in character. But in this latter case, there being no transfer or delivery of the stock, the doubt arises whether the parties intended there should ever be a purchase and delivery at all. Here is the dividing line. If there was not under any circumstances to be a delivery, as part of and completing a purchase, then the transaction was a mere wager on the rise and fall of prices; but if there was in good faith a purchase, then the delivery might be postponed, or made to depend on a future condition, and the stock carried on margin or otherwise in the meanwhile, without affecting the legality of the operation." And the rule goes so far that an

5. P says to D: "I will give you $25 if X's house does not burn this year, if you will promise me $5,000 in case it does." D accepts the offer. The house burns during the year in question. P sues D for $5,000. What decision?
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8. Does the doctrine of insurable interest apply to life insurance? Does it apply to maritime insurance?
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agreement for an actual sale and purchase will make the transaction valid though it originated in an intention merely to wager. *Anthony & Co.* v. *Unangst*, 174 Pa. 10.

Turning now to the facts of the present case, it is clear that the law was not correctly applied by the auditor and the court below. The brokers made an assignment on December 21, 1895, on which day they held certain stock for appellant, which they had bought on his order, and he had certain other stock which they had sold on his order, but which he had not yet delivered to them. He desired to close the account, complete the mutual deliveries and receive the balance which the transactions left in his favor. He was entitled to do so, even if the transactions were wagering, the agreement of the parties to make the sales actual would under *Anthony & Co.* v. *Unangst*, 174 Pa. 10, *supra*, have made them valid. It is true, the settlement was not actually made until January 10, but it was made as of December 20, the day before the assignment, and the auditor reports that there had been no change of values meanwhile. The time of striking a balance on the books and delivering the stock was not important. Delivery is not in itself a material fact. Its only value is as evidence of the intent to make a bona fide sale. If such is the intent, the delivery may be present or future without affecting validity.

But there was no sufficient evidence that the transactions were illegal at any time. The auditor reports that "the stocks ordered to be bought or sold by the customers of L. H. Taylor & Co., were as shown by their books, actually bought and sold, and as this evidence is uncontradicted I must and do so find." Thus, so far as L. H. Taylor & Co., were concerned, the transactions were not fictitious, but were actual purchases and sales of stock. This finding should have been a warning to caution in taking a different view of the appellant's position in the transactions. It is true, the purchase or sale may be actual on part of the broker and merely a wager on part of the customer (see *Champlin* v. *Smith*, 164 Pa. 481), but there should be at least fairly persuasive evidence of the difference. There is none here. The transactions covered by the account began with a small cash balance to appellant's credit, followed by an order to buy 200 shares of Wabash common, which were bought by the brokers, paid for by appellant and delivered to him. The close, two years and a half later, showed, as already said, a larger number of shares in the hands of the brokers, bought for appellant, and of which he

demanded delivery, and other shares sold for him and which he had in his possession ready to deliver. As to the intermediate transactions, appellant testified, "It was always the intention to buy the stocks out and out and pay for them, and I had money to do it with." In the face of these facts and this uncontradicted testimony, the auditor found that "the account, including his enormous short sales, has all the earmarks of a gaming transaction and I so find it." This was a mere inference, unwarranted by the account itself, and wholly opposed to all the evidence in the case.

Judgment, so far as it relates to appellant's claim, reversed and claim directed to be allowed.

QUESTIONS

1. What is meant by "selling short"? By "settling differences"? By "buying and selling on margin"?
2. How did the controversy arise in the principal case? What issue was presented for consideration by the controversy? How was this issue decided? What rule of law can be deduced from the decision?
3. P wagers D that the price of certain stock will go to par within thirty days. Is this agreement enforcible? Why or why not?
4. P wagers D that the price of wheat will go up to $3 a bushel before December. Is the agreement enforcible? Why or why not?
5. D contracts to sell cotton which he does not own. Is there anything illegal in such a contract? What will be the vendee's measure of damage in case D does not perform his promise? Can the seller and buyer rescind this agreement at any time before time for performance arrives? Can they rescind it on the day set for performance?
6. D, owning no stock, agrees to sell and deliver to P, within thirty days, 100 shares of certain stock, at $90 a share. P accepts the offer. When the day for performance arrives, the stock in question is worth $100 a share on the market. D refuses to deliver the stock. P sues D for damages. What decision?
7. At the end of thirty days, D says to P: "I cannot deliver the stock according to my promise, but if you will release me from my obligation, I will give you the difference between the price at which I agreed to sell and the present market value of the stock." P agrees to this. P is suing D for the difference agreed upon. D contends that both agreements are illegal. What decision?
8. D agrees to sell stock to P at a future day. It is understood by both parties that no stock is to be delivered but that they are to settle differences. P sues D on the contract. What decision?

9. In the foregoing case, D never expected to make a delivery of stock but P expected to receive stock. (*a*) P is suing D on the contract. (*b*) D is suing P. What decision in each case?
10. D is an expert student of market conditions and has been dealing on the Wheat Exchange for twenty-five years. He contracts to sell future wheat at a certain price. He has no intention of making a delivery of wheat. Is this contract valid?
11. It is said that the intention of the parties as to delivery determines the legality of contracts in "futures." Does this test seem sound to you? Can you suggest a better test?
12. Does an expert speculator perform a useful function? Does the usefulness of his activities depend upon the question whether he intends to make or receive deliveries of commodities in which he deals?

ALGER *v.* THACHER

19 Pickering's Massachusetts Reports 51 (1837)

Debt upon a bond dated August 6th, 1833. Upon oyer it appeared that the bond, after reciting that the plaintiff had purchased of the defendant 337 shares in the stock of the South Boston Iron Company, and had paid to him a large sum of money, was conditioned that the defendant should not "at any time hereafter, in his own name, or in the name of another, conduct, carry on, use or employ the trade or occupation of an iron founder or caster, or be concerned, interested, employed or engaged, directly or indirectly in any manner whatsoever or under any pretense whatsoever, in the business of founding or casting of iron." The defendant demurred generally to the declaration.

MORTON, J. The point for our decision is the validity of the bond declared on. The oyer spreads the instrument on the record and virtually makes it a part of the declaration. And the demurrer presents distinctly and in the best possible form, the question whether upon its face it appears to be a legal and valid obligation. 1 Chit. Pl. 416; 1 Saund. 10; *Dorr* v. *Fenne*, 12 Pick. 521.

The objection to the bond arises from the following clause, by which the defendant binds himself never hereafter "in his own name or in the name of another, to conduct, carry on, use, or employ the art, trade, or occupation of an iron founder or caster, or be concerned, interested, employed or engaged, directly or indirectly, in any manner whatsoever, or under any pretence whatsoever, in the business of

founding or casting of iron." This stipulation is too clear and explicit to be misunderstood. It will admit of but one construction. It purports to exclude the defendant, everywhere and at all times, from a participation in the trade or business referred to. Such a contract, the defendant contends, is against sound policy and contrary to established principles of law.

Among the most ancient rules of the common law, we find it laid down, that bonds in restraint of trade are void. As early as the second year of Henry V (A.D. 1415) we find by the yearbooks, that this was considered to be old and settled law. Through a succession of decisions, it has been handed down to us unquestioned till the present time. It is true, the general rule has, from time to time, been modified and qualified, but the principle has always been regarded as important and salutary.

For two hundred years, the rule continued unchanged and without exceptions. Then an attempt was made to qualify it by settling up a distinction between sealed instruments and simple contracts. But this could not be sustained upon any sound principle. A different distinction was then started, between a general and a limited restraint of trade, which has been adhered to down to the present day. This qualification of the general rule may be found as early as the eighteenth year of James I, A.D. 1621, *Broad* v. *Jollyffe*, Cre. Jac. 596, when it was holden that a contract not to use a certain trade in a particular place was an exception to the general rule and not void. And in the great and leading case on this subject, *Mitchel* v. *Reynolds*, reported in Lucas, 27, 85, 130, Fortescue, 296, and 1 P. Wms. 181, the distinction between contracts under seal, and not under seal, was finally exploded and the distinction between limited and general restraints fully established. Ever since that decision, contracts in restraint of trade generally have been held to be void; while those limited as to time or place or persons have been regarded as valid and duly enforced. Whether these exceptions to the general rule were wise and have really improved it, some may doubt; but it has been too long settled to be called in question by a lawyer.

This doctrine extends to all branches of trade and all kinds of business. The efforts of the plaintiff's counsel to limit it to handicraft trades, or to found it on the English system of apprenticeship, though enriched by deep learning and indefatigable research, have proved unavailing. In England, the law of apprenticeship and the law against the restraint of trade may have a connection. But we

think it very clear that they do not, in any measure, depend upon each other.

That the law under consideration has been adopted and practised upon in this country and in this state, is abundantly evident from the cases cited from our own reports. It is reasonable, salutary, and suited to the genus of our government and the nature of our institutions. It is founded on great principles of public policy and carries out our constitutional prohibition of monopolies and exclusive privileges.

The unreasonableness of contracts in restraint of trade and business is very apparent from several obvious considerations.

1. Such contracts injure the parties making them, because they diminish their means of procuring livelihoods and a competency for their families. They tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions. And they expose such persons to imposition and oppression.

2. They tend to deprive the public of the services of men in the employment and capacities in which they may be most useful to the community as well as to themselves.

3. They discourage industry and enterprise, and diminish the products of ingenuity and skill.

4. They prevent competition and enhance prices.

5. They expose the public to all the evils of monopoly. And this especially is applicable to wealthy companies and large corporations, who have the means, unless restrained by law, to exclude rivalry, monopolize business and engross the market. Against evils like these, wise laws protect individuals and the public, by declaring all such contracts void.

In the latest cases which we have examined, *Homer* v. *Ashford*, 3 Bing. 319, the English law is thus laid down by C. J. BEST: "The law will not permit any one to restrain a person from doing what the public and his own interests require that he should do. Any deed, therefore, by which a person binds himself not to employ his talents, his industry or his capital in any useful undertaking in the kingdom, would be void; because no good reason can be imagined for any person imposing such a restraint on himself. But it may often happen, that individual interest and general convenience may render engagements not to carry on trade or to act in a profession in a particular place proper." As to what shall be deemed a reasonable limita-

tion, there is and, from the nature of things, can be no definite rule. It must depend on the circumstances of each particular case, and the good sense and sound discretion of the tribunal which have the case to settle. It would be out of place now to investigate it. There is (in this case) no limitation as to time, place, or person. The restraint is perpetual and universal. And if the doctrine be in force in this country and can apply to any case, we think it must include the one before us now. In addition to the numerous authorities cited by counsel, we have examined and referred to the following: *Chesman* v. *Nainby*, 2 Ld. Raymd. 1455; *Harrison* v. *Goodman*, 1 Burr. 12; *Pierce* v. *Bartram*, Cowp. 269; *Gunmakers* v. *Fell*, Willes, 384; *Harrison* v. *Gardner*, 2 Madd. R. 198; *Shackle* v. *Baker*, 14 Ves. 468; *Morris* v. *Coleman*, 18 Ves. 468; *Crutterall* v. *Lye*, 17 Ves. 336.

Judgment for the defendant on the demurrer.

QUESTIONS

1. What objections did the court in the principal case urge against the validity of the agreement in question? Are these objections real or fanciful? Are they as real as they were two hundred years ago?
2. In consideration of P's promise to pay him $500, D closes out his grocery business and covenants that he will not open it up again. P sues D for a breach of this agreement. D contends that the agreement is illegal. What decision?
3. D has been running a drug store at 55th Street and Woodlawn Avenue. He sells his business to P and covenants that he will not go into the drug business again, anywhere in the United States. P sues D for a breach of this agreement. What decision?
4. D agrees that he will not re-engage in the drug business in the state of Illinois for a period of twenty-five years. P sues D for a breach of the agreement. What decision?
5. D agrees that he will not re-engage in the drug business anywhere within a mile of the drug store which he sells to P. P sues D for a breach of the agreement. What decision?
6. D has been manufacturing matches and has a national market. He sells out his business and covenants that he will not go into the business again for twenty-five years, at any place in the United States. P sues D for a breach of the agreement. What decision?
7. D has been manufacturing ordnance equipment and has a world-market. He sells out to P and covenants that he will not re-enter the same business anywhere in the world. P sues D for breach of the agreement. What decision?

EMERY *v.* OHIO CANDLE CO.

47 Ohio State Reports 320 (1890)

In 1880 an unincorporated company was formed, to continue six years, called the Candle Manufacturers' Association, which included the manufacturers of 95 per cent of the star candles in that part of the United States laying east of the 114 degree of longitude of Greenwich, or substantially all the territory east of the western boundary of Utah. Its object was to increase the price and decrease the manufacture of candles in the territory covered by the agreement and is found as a fact to have had that effect during the whole existence of the association. The members composing the association were required to pay into its treasury two and one half cents per pound on every pound of candles disposed of on their own account within the territory. But neither was bound to operate his factory; and whether he did, or did not, he received at stated times his proportion of the profits of the pool, which was based upon the business that had been done by him in previous years; thus making it to the interest of each member to operate his factory when the price of candles was high, and to remain idle when the price was low.

The receipts of the association were placed in a selected depository, the First National Bank of Cincinnati, to the credit of an executive committee, consisting of three members, selected by the association, and could only be paid out on a check signed by at least two of them. The claims of all members were adjusted by this committee.

The Ohio Candle Company, incorporated under the laws of this State, joined the association in 1883 and withdrew therefrom in March, 1884. During the month of January of that year it had paid into the association $22.40, but there was due to it, under the terms of the agreement, as profits of that month, the sum of $2,151.17. The committee agreed to pay the company the sum it had paid in, but refused to pay the sum due as profits, on the ground that by withdrawing before the expiration of the life of the association it had violated the agreement, and was entitled to none of its gains. Thereupon the company brought suit for the amount against the members composing the committee, to which the bank was made a party, asking that the bank be ordered to pay the money to the plaintiff or that a judgment be rendered in its favor for the amount with interest.

Issues of fact having been made up, the case was submitted to the court, and reserved for hearing in general term, which made a

finding of facts—the substance of which has been stated—and rendered judgment against the members of the committee which is sought to be reversed on the ground that it is against the law.

BY THE COURT. We are of the opinion that the suit cannot be maintained for the reason that the objects of the association were contrary to public policy, and in no way to be aided by the courts. No recovery can be had except by giving effect to the terms of the agreement. The action is, in substance, a suit against the association to recover a sum due the plaintiff under the terms on which the association was formed. The committee represents the association and a judgment against them is a judgment against it. If, as claimed by the defendants, a member could not withdraw from the association until the six years had expired, then the committee, as representing the association, had a defense on which they might have relied, had the objects of the association been perfectly legitimate. But should a court be called on to consider any defense, so long as the claim itself is based upon an agreement to which it can give no countenance? It must be observed that the withdrawal of the plaintiff was not at a time, or under circumstances, that could give to it the merits of repentance. It had passed beyond where it might, by withdrawal, have secured the aid of a court in recovering what it had advanced in furtherance of an illegal object. Its suit is to recover its portion of the illgotten gains. The case of *Norton* v. *Blinn*, 39 Ohio St. 145, can have no application here, for this is a suit between parties to enforce the terms of the illegal agreement. See *Texas & P. Ry. Co.* v. *Southern Pac. Ry. Co.*, 6 Southern Reporter, 888, where *Brooks* v. *Martin* 2 Wall. 70, is accurately distinguished, and shown to have no application to a case such as this.

Judgment reversed, and petition of plaintiff below dismissed.

QUESTIONS

1. What was the issue under consideration in the principal case? How was the issue decided? What rule of law can be deduced from this decision?
2. Does such an agreement serve any useful, social purpose? Did the parties in this case have any legitimate interest to protect by the agreement?
3. What are the possible injurious consequences of such an agreement? Are these consequences so serious that a court is justified in holding all agreements of this kind void?

4. Certain large milk interests agree to reduce the price of milk to a low level. Their purpose is to drive out as many small competitors as possible and gain control of the milk market. Is the agreement legal?
5. Certain manufacturers of the same product find that competition between them is becoming ruinous. They meet and agree that they will sell their product at a uniform but reasonable price. Is the agreement legal?
6. For the same reason these manufacturers agree on a division of the market. Each is assigned a certain part of the market in which he is promised the exclusive right to sell the commodity at any price he desires to fix. Is this agreement legal?
7. P manufactures and sells a superior brand of flour for which he has created a wide market by a costly and extensive advertising campaign. He sells it to retailers who contract with him that they will not sell the flour below a certain minimum price. P sues D, a retailer, for breach of one of these contracts. What decision?

LLOYD *v.* SCOTT

29 United States Reports 205 (1830)

McLEAN, J. The requisites to form an usurious transaction are three: (1) A loan either express or implied. (2) An understanding that the money lent shall be returned. (3) That a greater rate of interest, than is allowed by the statute, shall be paid.

The intent with which the act is done is an important ingredient to constitute this offense. An ignorance of the law will not protect a party from the penalties of usury where it is committed; but where there is no intention to evade the law, and the facts which amount to usury, whether they appear upon the face of the contract or by other proof, can be shown to have been the result of mistake or accident, no penalty attaches.

At an early period in the history of English jurisprudence, usury, or as it was then called, the loaning of money at interest, was deemed a very high offense. But since the days of Henry VIII, the taking of interest has been sanctioned by statute. In this country some of the states have no laws against taking any amount of interest which may be fixed by the contract.

The act of usury has long since lost that deep moral stain which was formerly attached to it; and is now generally considered only as an illegal or immoral act, because it is prohibited by law. Assuming the position, that the pleas contain no averments which extend beyond

the terms of the contract, the counsel in support of the demurrers have contended, that no fair construction of the deed will authorize the inference that it was given on an usurious consideration. It was the purchase of an annuity, it is contended; and though the annuity may produce a higher rate of interest than 6 per cent upon the consideration paid for it, yet this does not taint the transaction with usury.

If the court were limited by the pleas to the words of the contract, and it purported to be a purchase of an annuity, and no evidence were adduced giving a different character to the transaction, this argument would be unanswerable. An annuity may be purchased like a tract of land or other property, and the inequality of price will not, of itself, make the contract usurious. If the inadequacy of the consideration be great in any purchase, it may lead to suspicion; and connected with other circumstances may induce a court of chancery to relieve against the contract.

In the case under consideration, five thousand dollars were paid for a ground (annuity) rent of five hundred dollars per annum. This circumstance, although 10 per cent be received on the money paid, does not make the contract unlawful. If it were a bona fide purchase of an annuity, there is an end to the question; and the condition which gives the option to the vendor to repurchase the rent, by paying the five thousand dollars after the lapse of five years, would not invalidate the contract. The right of repurchase, as also the inadequacy of price, would be circumstances for the consideration of the jury.

QUESTIONS

1. What is the essence of usury? Why should an agreement calling for usurious interest be held illegal?
2. P contracts with D to sell him a horse, worth about $250, for $500. P sues D for his failure to accept and pay for the horse. What decision?
3. P rents a house to D for $50 a month. Twenty-five dollars would be a reasonable rent for the house. P sues D for the rent agreed upon. What decision?
4. P sells D an annuity of $500 a year for $5,000. D covenants to surrender the annuity at the end of five years upon the payment by P of $5,000. The statutes of the state where the transaction took place provided that no person shall take more than six dollars for the forbearance of one thousand dollars per annum. Is this transaction legal?
5. A statute of a certain state forbids a rate of interest in excess of 8 per cent. P loans $1,000 to D at 10 per cent interest. What are P's rights against D when the debt matures?

6. A statute forbids the doing of "common work and labor" on the Sabbath Day. (*a*) On a Sabbath Day, D executes a promissory note to P, payable on a week day. (*b*) On a week day, D executes a note to P, payable on a Sabbath Day. Comment on the legality of the note in each case.
7. (*a*) A statute forbids the making of certain contracts and provides a penalty for violation of the statute. (*b*) A statute provides that certain types of contract can be entered into only when a license to make such contracts is held by one of the parties and provides a penalty for violation of the statute. Comment on the enforcibility of contracts made in violation of each statute.

ERIE RAILWAY CO. *v.* UNION LOCOMOTIVE CO.

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This suit was in case on promises. The defendant demurred generally to the whole declaration and there was a joinder.

BEASLEY, C. J. Admitting, then, for the purpose of the argument, the illegality insisted on, the legal problem plainly is this: whether, when a defendant has agreed to do two things which are entirely distinct, and one of them is prohibited by law and the other is legal and unobjectionable, such illegality of the one stipulation can be set up as a bar to a suit for a breach of the latter and valid one. This point was but slightly noticed on the argument; nevertheless, an examination of the authorities will show that the rule of law upon the subject has, from the earliest times, been at rest. It was unanimously agreed, in a case reported in the Year Books 14 Henry VIII, 25, 26, that if some of the covenants of an indenture, or of the conditions indorsed upon a bond are against law, and some good and lawful, that in such cases the covenants or conditions which are against law are void *ab initio* and the others stand good. And from that day to this, I do not know that this doctrine, to the extent of its applicability to this case, has anywhere been disallowed. It was the ground of the judgment in *Cherman* v. *Nainby* (2 Lord Raymond 1456), that being a suit on an apprentice's bond. The stipulation alleged to have been broken was, that the apprentice would not carry on the business in which she was to be instructed, within "the space of half a mile" of the then dwelling-house of the plaintiff. There was also a further stipulation that she should not carry on this business within half a mile of any house into which the plaintiff might remove. The suit was for a breach of the former stipulation, and it was admitted that

the latter one was void, as imposing an unreasonable restraint on trade, and it was urged that, by force of this illegal feature, the whole contract was void. But the court were unanimously of opinion that as the breach was assigned upon that part of the condition which was good in law, therefore if the other part to which exception was taken, was against law, yet that would not hinder the recovery upon part of the condition which was legal. The judgment was afterwards affirmed by the twelve judges, on an appeal to Parliament. 3 Bro. Parl. C. 349.

These and other authorities which might be referred to settle the rule, that the fact that one promise is illegal will not render another disconnected promise void. The doctrine will not embrace cases where the objectionable stipulation is for the performance of an immoral or criminal act, for such an ingredient will taint the entire contract, and render it unenforceable in all its parts, by reason of the maxim *ex turpi causa non oritur actio*. Nor will it, in general, apply where any art of the consideration is illegal, so that in the present case, if, upon the trial, it should appear that the plaintiffs have agreed to pay to the defendants more than the charter of the latter allows, it may become a question whether this suit will lie. There are many decisions to effect that where there are a number of considerations, and any one of them is illegal, the whole agreement is avoided, this doctrine being put upon the ground of the impossibility of saying how much or how little weight the void portions have had as an inducement to the contract. But, at the present stage of the case, the entire consideration of the promise sued must be regarded by the court unobjectionable, as there is nothing on the record to show any overcharge.

On the ground, then, that both the consideration and the promise, which is the foundation of the action, appear to be valid, the plaintiffs must have judgment on this demurrer.

It is proper to remark that as the demurrer is a general one to the whole declaration, I have considered only the cause of action set out in the first count.

Judgment for the plaintiffs.

QUESTIONS

1. What was the issue under consideration in the principal case? How was the issue decided? What rule of law can be deduced from the decision?

6. A statute forbids the doing of "common work and labor" on the Sabbath Day. (*a*) On a Sabbath Day, D executes a promissory note to P, payable on a week day. (*b*) On a week day, D executes a note to P, payable on a Sabbath Day. Comment on the legality of the note in each case.
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that he will. Assuming that other necessary elements of fraud are present, is the statement fraudulent in either case?

3. (*a*) D says that his land is worth $5,000. (*b*) D says his land cost him $5,000. (*c*) D says that stock in a certain corporation is very valuable. (*d*) D, in an advertisement, says that his soap is the best on the market. Can actionable fraud be predicated upon any of the foregoing statements?
4. D, knowing that he was insolvent, induced P to sell him a consignment of goods on credit and promised to pay for them in thirty days. D did not pay for the goods within thirty days. What are the rights of P against D?
5. P procured D's signature to a negotiable instrument by a false statement that the instrument was non-negotiable. P sues D on the note. D pleads fraud as a defense. What decision?
6. D buys P's stock in a certain corporation for $25 a share. D knows, but P does not know, that the corporation has just discovered valuable minerals on its land which will make its stock worth $50 a share. This fact D does not disclose to P. What are P's rights, if any, against D?
7. D falsely tells P that a certain lot, which he is offering for sale, extends to the alley. P, relying on this statement, buys the lot. (*a*) D knew that the lot did not extend to the alley. (*b*) He did not know whether it extended to the alley or not. (*c*) He honestly believed that it extended to the alley. Where are P's rights against D's?

LEWIS *v.* JEWELL

151 Massachusetts Reports 345 (1890)

Tort, by the administratrix of the estate of Edward Lewis, for false and fraudulent representations made by the defendant to the intestate in a sale of carpets represented to amount to 900 yards, which in fact amounted to only 595 yards. Exception by defendant to refusal of court to charge that if intestate had full means of ascertaining the number of yards and had an opportunity to inspect and measure them, the representations of defendant, though false and intentional, would not entitle plaintiff to recover, and to the charge of the court that if defendant made an intentional false representation to induce the intestate to purchase, and if the intestate, in the exercise of due care, relied on it, the jury would be justified in finding for the plaintiff. Verdict for the plaintiff.

KNOWLTON, J. The carpets bought by the plantiff's intestate covered four floors, consisting of twelve rooms, besides the hall and stairs in a dwelling-house. The number of yards of material contained

in them was an important element in determining their value, which might be the subject of a fraudulent representation. The representation of the defendant was not a mere estimate but a statement purporting to be made as of her own knowledge, and there was evidence tending to show that it was known by her to be false. There was also evidence that the purchaser relied upon it; and if the testimony introduced by the plaintiff was true, the defendant was liable for fraud, unless the purchaser was bound to measure the carpets for himself, or to avail himself of his other opportunities of ascertaining the quantity.

Upon the evidence presented, it could not properly have been ruled, as a matter of law, that the facts were so obvious or so easily discoverable that the plaintiff's intestate had no right to rely on the defendant's representations. In this Commonwealth, and in other American states, in regard to representations of the vendor, in a sale of land, it has been held that in the absence of other fraud a vendee to whom boundaries are pointed out has no right to rely on the vendor's statements as to quantity, but if he deems the quantity material, he should ascertain it for himself. *Gordon* v. *Parmalee*, 2 Allen, 212; *Noble* v. *Goggins*, 99 Mass. 231, and cases cited; *Parker* v. *Moulton*, 114 Mass. 99. We are of opinion that this rule should not be extended so as to include a case like the present, and that the instruction under which the questions were submitted to the jury was correct and sufficient.

Exceptions overruled.

QUESTIONS

1. What instruction did the defendant ask the court to give to the jury? What instruction did the court give? What rule of law is laid down by this case?
2. Suppose that the plaintiff had known that there were not 900 yards of carpets at the time of the sale, what would have been the decision of the court in this case?
3. What was the action brought in this principal case? With what offense was the defendant charged in this action? Was this the only remedy open to the plaintiff when the discrepancy in the number of yards of carpet was discovered?
4. D tells P that a horse, which D is attempting to sell, is only ten years old. P, knowing that D is lying about the age of the horse, buys it. P sues D in deceit for damages. What decision?
5. D fraudulently represents to P that A and B are stockholders in a certain company. Induced by this statement P purchases stock in the

corporation. When P discovers that A and B are not stockholders in the company he sues D in deceit for damages. D contends that he is not liable in deceit because P has suffered no damage in reliance on the statement. What decision?

6. D, innocently but erroneously, represents that his farm contains 500 acres. P is induced by this statement to buy the farm. It turns out upon a survey that the farm contains only 425 acres. What are P's remedies, if any, against D?

4. Assignment of Contracts

ARKANSAS VALLEY COMPANY *v.* MINING COMPANY

127 United States Reports 379 (1888)

This was an action for damages for the alleged breach of a contract. A demurrer to the complaint was sustained. The plaintiff brings error.

GRAY, J. If the assignment to the plaintiff of the contract sued on was valid, the plaintiff was the real party in interest, and as such entitled, under the practice in Colorado, to maintain this action in its own name. Rev. Stat. Sec. 914, Colorado Code of Civil Procedure, sec. 3. The vital question in this case, therefore, is whether the contract between the defendant and Billings and Eilers was assignable by the latter, under the circumstances stated in the complaint.

At the present day, no doubt, an agreement to pay money or to deliver goods may be assigned by the person to whom the money is to be paid, or the goods are to be delivered, if there is nothing in the terms of the contract, whether by requiring something to be afterward done by him or by some other stipulation, which manifests the intention of the parties that it shall not be assignable.

But everyone has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman: "You have the right to the benefit you anticipate from the character, credit and substance of the party with whom you contract." *Humble* v. *Hunter*, 12 Q. B. 310. The rule upon this subject as applicable to the case at bar is well expressed in a recent English treatise "Rights arising out of contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided." Pollock on *Contracts* (4th ed. 425).

The contract here sued on was one by which the defendant agreed to deliver ten thousand tons of lead ore from its mines to Billing and Eilers at their smelting works. The ore was to be delivered at the rate of fifty tons a day, and it was expressly agreed that it should become the property of Billing and Eilers as soon as delivered. The price was not fixed by the contract, or payable upon the delivery of the ore. But as often as a hundred tons of ore had been delivered, the ore was to be assayed by the parties or one of them, and, if they could not agree, by an umpire; and it was only after this had been done and according to the result of the assay and the proportions of lead, silver, silica, and iron thereby proved to be in the ore, that the price was to be ascertained and paid. During the time that must elapse between the delivery of the ore and the ascertainment and payment of the price, the defendant had no security for its payment, except in the character and solvency of Billings and Eilers. The defendant, therefore, could not be compelled to accept the liability of any other person or corporation as a substitute for the liability with whom it had contracted.

The fact that, upon the dissolution of the firm of Billing and Eilers and the transfer by Eilers to Billing of this contract, together with the smelting works and business of the partnership, the defendant continued to deliver ore to Billing according to the contract, did not oblige the defendant to deliver ore to a stranger, to whom Billing had undertaken, without the defendant's consent, to assign the contract. The change in a partnership by the coming in or the withdrawal of a partner might, perhaps, be held to be within the contemplation of the parties originally contracting; but however that may be, an assent to such a change in the one party cannot estop the other to deny the validity of a subsequent assignment of the whole contract to a stranger. The technical rule of law, recognized in *Murray* v. *Harway* (56 N.Y. 337), cited for the plaintiff, by which a lessee's express covenant not to assign has been held wholly determined by one assignment with the lesser's consent, has no application to this case.

The cause of action set forth in the complaint is not for any failure to deliver ore to Billing before his assignment to the plaintiff (which might perhaps be assignable chose in action), but it is for a refusal to deliver ore to the plaintiff since his assignment. Performance and readiness to perform by the plaintiff and its assignors, during the periods for which they respectively held the contract, is all that is

alleged; there is no allegation that Billing is ready to pay for any ore delivered to the plaintiff. In short, the plaintiff undertakes to step into the shoes of Billing and to substitute its liability for his. The defendant had a perfect right to decline to assent to this, and to refuse to recognize a party with whom it had never contracted as entitled to demand further deliveries of ore.

Judgment affirmed.

QUESTIONS

1. What issue was under consideration in the principal case? How was the issue decided? What rule of law can be deduced from the decision?
2. What did Billing and Eilers purport to sell to the plaintiff in this case? Why was the sale held ineffective without the consent of the defendant?
3. X is under a contract to sell and deliver coal to D for the price of $100. X delivers coal which is acceptable to D. He later "assigns the contract" to P. P sues D for $100. What decision?
4. Before X has delivered coal to D, X assigns the contract to P. P tenders coal of the kind ordered by D. D refuses to accept the coal. P sues D for his refusal to accept the coal. What decision?
5. D agrees to sell X a horse, "cash on delivery." X sells his contract to P. What are the rights of P against D?
6. In the foregoing case, D sells his contract to P. What are P's rights against X?
7. X agrees to paint a portrait of D's wife for which D agrees to pay X the sum of $1,000. (*a*) Before the portrait is painted, X assigns the contract to P. (*b*) After the portrait is painted, X assigns the contract to P. What are the rights of P against D under each hypothesis?
8. X accepts a contract from the city of D to clean its streets. X sells his contract to P. What is P's relation to the city after the sale under the contract? What is X's relation to the city after the sale?
9. Examine the case of *Boston Ice Company* v. *Potter*, *supra* p. 249, and be prepared to answer why the plaintiff in that case might not have recovered from the defendant on the theory of an assignment of the contract.

WELCH *v.* MANDEVILLE

1 Wheaton's United States Reports 233 (1816)

STORY, J. The question upon these pleadings comes to this, whether a nominal plaintiff suing for the benefit of his assignee, can, by a dismissal of the suit under a collusive agreement with the defendant,

create a valid bar against any subsequent suit for the same cause of action.

Courts of law, following in this respect the rules of equity, now take notice of assignments of choses in action, and exert themselves to afford them every support and protection not inconsistent with the established principles and modes of proceedings which govern tribunals acting according to the course of the common law. They will not, therefore, give effect to a release procured by the defendant under a convenous combination with the assignor in fraud of his assignee, nor permit the assignor injuriously to interfere with the conduct of a suit commenced by his assignee, to enforce the rights which passed under the assignment. The dismissal of the former suit, stated in the pleadings in the present case, was certainly not a *retraxit;* and if it had been, it would not have availed the parties since it was procured by fraud. Admitting a dismissal of a suit by agreement to be a good bar to a subsequent suit, on which we give no opinion, it can be so only when it is bona fide, and not for the purpose of defeating the rights of third persons. It would be strange, indeed, if parties could be allowed, under the protection of its form, to defeat the whole object and purpose of the law itself.

It is the unanimous opinion of the court that the judgment of the circuit court, overruling the replication to the second plea of the defendant is erroneous and the same is reversed and the cause is remanded for further proceedings.

Judgment reversed.

QUESTIONS

1. What issue was under consideration in this case? How was the issue decided? What rule of law can be deduced from this decision?
2. Why should the assignee of a chose in action be compelled to bring action in the name of his assignor?
3. Suppose that the defendant had been ignorant of the assignment when the plaintiff agreed to dismiss the action against him on the claim, would the decision of the court have been the same?
4. X, having a claim against D for $1,000, sells it to P. (*a*) D, ignorant of the sale, pays X $1,000 in discharge of the claim. (*b*) D, knowing of the assignment, pays X. What are P's rights under each hypothesis?
5. X by fraud induced D to give him a legally enforcible promise for $100. X sells his claim against D to P. (*a*) P knows of the fraud when he buys the claim. (*b*) He is ignorant of the fraud when he buys the claim. What are his rights against D under each hypothesis?

6. X holds a claim against D for $100. On January 1, X sells the claim to M. On January 5, X sells the same claim to P. Who is entitled to collect the $100 from D?
7. X holds a claim of $1,200 against D. He assigns one-third of the claim to M, a third to N, and a third to P. What are the rights of M, N, and P against D in respect to the original claim?
8. How is the sale of a chose in action made? Must the sale be in writing? Need it be expressed in any certain words? Is a consideration necessary for the validity of such a sale?

5. Performance of Contracts

NOLAN *v.* WHITNEY

88 New York Reports 648 (1882)

In July, 1877, Michael Nolan, the plaintiff's testator, entered into an agreement with the defendant to do mason work in the erection of two buildings in the city of Brooklyn for the sum of $11,700, to be paid to him by her in instalments as the work progressed. The last instalment of $2,700 was to be paid thirty days after completion and acceptance of the work. The work was to be performed to the satisfaction and under the direction of M. J. Morill, architect, to be testified by his certificate, and that was to be obtained before any payment could be required to be made. As the work progressed, all the instalments were paid except the last, and Nolan, claiming that he had fully performed his agreement, commenced this action to recover that instalment. The defendant defended the action upon the ground that Nolan had not fully performed his agreement according to its terms and requirements, and also upon the ground that he had not obtained the architect's certificate, as required by the agreement.

Upon the trial the defendant gave evidence tending to show that much of the work was imperfectly done, and that the agreement had not been fully kept and performed on the part of Nolan; the latter gave evidence tending to show that the work was properly done; that he had fairly and substantially performed his agreement; and that the architect had refused to give him the certificate which, by the terms of his agreement, would entitle him to the final payment. The referee found that Nolan completed the mason work required by the agreement according to its terms; that he in good faith intended to comply with, and did substantially comply with, and perform the

requirements of his agreement; but that there were trivial defects in the plastering for which a deduction of $200 should be made from the last instalment, and he ordered judgment in favor of Nolan for the last instalment, less $200.

PER CURIAM. It is a general rule of law that a party must perform his contract before he can claim the consideration due him upon performance; but the performance need not in all cases be literal and exact. It is sufficient if the party bound to perform, acting in good faith, and intending and attempting to perform his contract, does so substantially, and then he may recover for his work, notwithstanding slight or trivial defects in performance, for which compensation may be made by an allowance to the other party. Whether a contract has been substantially performed is a question of fact depending upon all the circumstances of the case to be determined by the trial court. *Smith* v. *Brady*, 17 N.Y. 189; *Thomas* v. *Fleury*, 26 *id.* 26; *Phillip* v. *Gallant*, 62 *id.* 256; *Bowery National Bank* v. *Mayor*, 63 *id.* 336. According to the authorities cited, under an allegation of substantial performance upon the facts found by the referee, Nolan was entitled to recover unless he is barred because he failed to get the architect's certificate, which the referee found was unreasonably and improperly refused. But when he had substantially performed his contract, the architect was bound to give him the certificate, and his refusal to give it was unreasonable; and it is held that an unreasonable refusal on the part of an architect in such a case to give the certificate dispenses with its necessity.

Affirmed.

QUESTIONS

1. Was the defendant's promise in this case absolute or conditional? If it was conditional, what was the condition upon which it depended? What kind of condition was it?
2. What did the plaintiff promise in this case? Did he perform his promise? If not, upon what theory was he granted a recovery?
3. Did it appear in the principal case that the architect fraudulently withheld the certificate? What would have been the decision of the court, in case he had fraudulently withheld it?
4. D agreed to sell goods to P at a price to be fixed by X. X died before he had fixed the price. P sues D for his refusal to sell and deliver the goods. What decision?
5. What would have been the decision in the foregoing case, had X refused to act in fixing the price of the goods?

6. Define a condition. What is the difference between a condition and a promise? What is the difference between a condition and a warranty?
7. What is an express condition? A condition implied in fact? A condition implied in law?
8. What is a condition precedent? A condition subsequent? A condition concurrent?
9. What is the difference between a breach of contract and a breach of a condition in the contract? What is the effect on a contract of a breach of condition?

DUPLEX SAFETY BOILER CO. *v.* GARDEN

101 New York Reports 387 (1886)

Appeal from a judgment of the Supreme Court at General Term in the second department, affirming a judgment for the plaintiff, and from an order denying the defendants' motion for a new trial.

DANFORTH, J. The plaintiff sued to recover $700, the agreed price as it alleged, for materials furnished and work done for the defendants at their request. The defense set up was that the work was done under a written contract for the alteration of certain boilers, and to be paid for only when the defendants "were satisfied that the boilers as changed were a success." Upon the trial it appeared that the agreement between the parties was contained in letters, by the first of which the defendants said to plaintiff:

"You may alter our boilers, changing all the old sections for your new pattern, changing our fire front, raising both boilers enough to give ample fire space, you doing all disconnecting and connecting, also all necessary mason work and turning boilers over to us ready to steam up. Work to be done by tenth of May next. For above changes we are to pay you $700, as soon as we are satisfied that the boilers as changed are a success, and will not leak under a pressure of one hundred pounds of steam."

The plaintiff answered, "accepting the proposition," and as the evidence tended to show, and as the jury found, completed the required work in all particulars by the tenth of May, 1881, at which time the defendants began and thereafter continued the use of the boilers.

The contention on the part of the appellants is that the plaintiff was entitled to no compensation, unless the defendants "were satisfied that the boilers as repaired were a success, and that this question

was for the defendants alone to determine," thus making their obligation depend upon the mental condition of the defendants, which they alone could disclose. Performance must of course accord with the terms of the contract, but if the defendants are at liberty to determine for themselves when they are satisfied, there would be no obligation, and consequently no agreement which could be enforced. It cannot be presumed that the plaintiff entered upon its work with this understanding, nor that the defendants supposed they were to be the sole judge in their own cause. On the contrary, not only does the law presume that for services rendered, remuneration shall be paid, but here the parties have so agreed. The amount and manner of compensation are fixed; time of payment is alone uncertain. The boilers are changed. Were they, as changed, satisfactory to the defendants? In *Folliard* v. *Wallace* (2 Johns. 395), W. covenanted that in case the title to a lot of land conveyed to him by F. should prove good and sufficient in law against all other claims, he would pay to F. $150, three months after he should be "well satisfied" that the title was undisputed. Upon suit brought the defendant set up that he was "not satisfied," and the plea was held bad, the court saying, "a simple allegation of dissatisfaction, without some good reason assigned for it, might be a mere pretext and cannot be regarded." This decision was followed in City of Brooklyn City R.R. Co. (47 N.Y. 475) and *Miesell* v. *Glove Mut. L. Ins. Co.* (76 *id.* 115).

In the case before us the work required was specified and was completed; the defendants made it available and continued to use the boilers without objection or complaint. If there was full performance on the plaintiff's part, nothing more could be required, and the time for payment had arrived; for according to the doctrine of the foregoing cases, "that which the law will say a contracting party ought in reason to be satisfied with, that the law will say he is satisfied with."

Another rule has prevailed, where the object of a contract was to gratify taste, serve personal convenience, or satisfy individual preference. In either of these cases the person for whom the article is made, or the work done, may properly determine for himself—if the other party so agree—whether it shall be accepted. Such instances are cited by the appellants. One who makes a suit of clothes (*Brown* v. *Foster*, 113 Mass. 136), or undertakes to fill a particular place as agent (*Tyler* v. *Ames*, 6 Lans. 280), mold a bust (*Zaleski* v. *Clark*, 44 Conn. 218), or paint a portrait (*Gibson* v. *Cranage*, 39 Mich. 49;

Hoffman v. *Gallaher*, 6 Daly, 42), may not unreasonably be expected to be bound by the opinion of his employer, honestly entertained. A different case is before us, and in regard to it no error has been shown.

Judgment affirmed.

QUESTIONS

1. Precisely what did the court decide in the principal case? What rule of law can be deduced from this decision?
2. When were the defendants, according to their promise, to pay the plaintiff for his materials and services? Had the time ever arrived? If not, why should judgment have been given for the plaintiff?
3. What was the condition, if any, under consideration in this case? What kind of condition was it?
4. Before the plaintiff was entitled to recover in this case, what did he have to allege and prove?
5. Suppose that there had been a breach of condition in this case which the defendant had not waived, what remedies would have been open to him?
6. P agreed to make a suit of clothes to D's satisfaction. D refused to accept the suit because it did not satisfy him. P sued him for the price of the suit and offered evidence tending to show that the suit would have satisfied a reasonable man. Should the evidence be admitted?
7. D asked P to instal a furnace in his home that would keep an even temperature of 70° "in forty degrees below zero weather," for which he promised to pay D the sum of $500. P installed a furnace in D's house and now sues him for the purchase price. D, by way of defense, alleges and proves that the temperature has not fallen 40° below zero since the furnace was installed. What decision?
8. P sold goods to D who promised to pay for them when he was able. P sues D for the price of the goods. What must P allege and prove before he is entitled to recover?

HAYDEN *v.* BRADLEY

6 Gray's Massachusetts Reports 425 (1856)

Action of contract to recover damages for the defendant's failure to keep in repair the buildings included in a lease from the defendant to the plaintiff on a hotel and farm in Southwick, by which the defendant covenanted to "put the buildings and fences on, around, and about the premises in good condition, and so to maintain them for and

during the term of the lease," and the plaintiff covenanted "that the lessor may enter to view and make improvements, and to expel the lessee, if he shall fail to pay the rent, or make or suffer any strip or waste thereof."

At the trial in the Court of Common Pleas the defendant, who resided in Springfield, contended that he was not liable, under his covenant, for damages arising from want of repair after the plaintiff had entered into the occupation of the premises under the lease and before notice to the defendent of such want of repair. But MELLEN, C. J., instructed the jury that "for defects in the buildings, occurring after the commencement of the lease, the plaintiff was entitled to recover damages for such want of repair from the time such defects occurred; it being the duty of the defendant, under this lease, to take notice of such defects or want of repair, and prevent damage to the plaintiff by repairing the same, without notice from the plaintiff." The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

METCALF, J. The established rule of law which the court is now to apply is rightly stated by Lord ABINGER in *Vyse* v. *Wakefield*, 6 M. & W. 452, 453. It is this: "Where a party stipulates to do a certain thing in a certain specific event which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it; but when it is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given him." The case at bar comes within the first branch of this rule. The defendant stipulated to maintain the buildings in good condition during the term for which he demised them to the plaintiff, on the happening of a specific event, to wit, that they should not be in good condition, but should need repairs. He might have known, or made himself acquainted with the fact, that they needed repairs. And he did not stipulate for notice. See *Smith* v. *Goffe*, 2 Ld. Raym. 1126, and 11 Mod. 48; 1 Saund. Pl. & Ev. (2d ed.) 214; System of Pleading, 126, 127; Lawes Pl. in Assump. (Amer. ed.) 176 *et seq.*

But if the defendant's agreement to maintain the buildings in good condition were not of itself sufficient to decide the question raised in this case, yet there is another clause in the lease which is decisive, namely, the reservation by the defendant of a right of entry upon the premises "to view and make improvements." He, therefore, having provided for himself the means of ascertaining the contingency, upon

which he was to make repairs, was not entitled to notice from the plaintiff that the contingency had happened. *Key* v. *Rowall*, 2 A. K., Marsh. 254.

Exceptions overruled.

QUESTIONS

1. What instructions did the trial court give to the jury? Were these instructions correctly given? What rule of law can be deduced from the decision in this case?
2. Suppose that the defendant had not had the right to enter the premises during the term of the lease, would the decision of the court have been the same in this case?
3. D agrees to build a house for P according to specifications furnished by an architect to be appointed by P. Is D's promise conditional? What is the condition? How does it arise? What is the effect of P's failure to perform it? What must P allege and prove in order to recover from D for his failure to build the house?

ANONYMOUS CASE

Year Book 15 Henry 7, folio 10 B (1500)

FINEUX, C. J. If one covenant with me to serve me for a year, and I covenant with him to give him 20 pounds, if I do not say for said cause, he shall have an action for the 20 pounds although he never serve me; otherwise, if I say he shall have 20 pounds for said cause. So if I covenant with a man that I will marry his daughter and he covenants with me to make an estate to me and to his daughter, and to the heirs of our two bodies begotten, yet I shall have an action or covenant against him, to compel him to make this estate; but if the covenant be that the will make the estate to us for said cause, then he shall not make the estate until we are married. And such was the opinion of the court. And REDE, J., said it was so without doubt.

QUESTIONS

1. D covenants to convey Blackacre to P. P covenants to pay money to D. Were these covenants enforcible at the time of the decision in the principal case? What was the consideration for P's promise? For D's promise? Could P have sued D upon the latter's covenant without alleging performance or tender of performance of his covenant?
2. At this time, how could one party avoid having his covenant enforced

against him until the other party had performed or tendered performance of his covenant?

3. D agrees to convey Blackacre to P. At the same time, P agrees to pay $1,000 to D. It is their understanding that the $1,000 is the purchase price of Blackacre. What are the rights of the parties against each other on these promises at the present time?
4. Are the promises in the foregoing case conditional? If so, what are the conditions? What kind of conditions are they? How did the conditions become a part of the contract?

HUNT *v.* LIVERMORE

5 Pickering's Massachusetts Reports 395 (1827)

This was an action of assumpsit on a promissory note, not negotiable, from the defendant to the plaintiff, dated February 26, 1823, for $1,400, payable on demand.

At the trial before MORTON, J., the plaintiff called a witness, who testified that on the second of December, 1824, the plaintiff demanded of the defendent payment of the note, and a return of the bond hereinafter mentioned; but that the defendant did not pay the note, nor return the bond, but replied that what was written is written.

The defendant then gave in evidence a bond from the plaintiff, dated February 26, 1823, conditioned that the plaintiff, upon the defendant's paying him the sum of $1,400, should make and execute to the defendant a good and valid warranty deed of certain land which the defendant had agreed to purchase of the plaintiff for the sum mentioned.

The defendant also produced the following receipt, signed by the plaintiff; "February 26, 1823. Received of E. S. Livermore a note of hand for $1,400 for which I have this day given him a bond for a deed of a certain piece of land; but provided the bargain is not carried into effect, I am to deliver up said note upon said Livermore's delivering up said bond."

The defendant contended that the plaintiff was not entitled to his action before he had tendered a deed of the estate described in the bond, and that the defendant now had a right to rescind the contract referred to in the bond and receipt, and to return the bond to the plaintiff, which he offered to do in court. But the judge, being of opinion that these facts did not amount to a defence against the note directed the defendant to be called. If the whole court should be of

a different opinion, the default was to be taken off and the plaintiff to become non-suit.

PUTNAM, J. We think that the note, the receipt, and the bond should be construed as if they were parts of one contract.

The plaintiff, on his part, agreed to convey the land to the defendant when he should pay the purchase money, and the defendant agreed to pay the purchase money when the plaintiff should convey the land. As no time for the conveyance or for the payment is mentioned the law supplies the deficiency by providing that the contract should be executed in a reasonable time. And an offer to do what the contract required of either party, and a demand and refusal of the other to do what was required of him, would entitle the party so offering to perform to a remedy upon the contract. It is clear to our minds that the contract is to be construed as containing dependent stipulations. Neither party intended to trust to the personal security of the other. If Hunt had in a reasonable time offered to give a good deed of the land, and had demanded payment of the money mentioned in the note, and Livermore had refused to accept the deed and to pay according to his engagement, Hunt would have had his remedy at law against Livermore for the purchase money. On the other hand, if Livermore had in a reasonable time offered to pay his note, and had demanded a deed, and Hunt had refused to accept the money and to give the deed simultaneously, Livermore would have had his remedy at law against Hunt for the damages sustained by his not conveying the land according to his agreement.

If the stipulation contained in the receipt of the plaintiff to deliver up the note upon the defendant's delivering up the bond, "provided the bargain is not carried into effect," were to be construed to give either party an election at his own pleasure to annul the contract, it is evident that the contract could never be carried into effect against him who should please to avoid it. It would, in effect, have no binding operation. It would not be what the civil law defines, *juris vinculum quo necessitate adstringimur*. "It is of the essence of all agreements which consist of promising something, that they should produce an obligation in the party making the promise to discharge it; hence it follows that nothing can be more contradictory to such an obligation than the entire liberty of the party making the promise, to perform it or not as he may please." Pothier on *Oblig.* no. 47, 48. The case at bar strongly illustrates that position. If it were that either party had the entire liberty of vacating it, the contract

would be void for want of obligation. It would stand thus: Hunt engages to convey his land to Livermore for $1,400, if Hunt shall please to do so; and Livermore engages to pay $1,400 for the land, if he shall please to do so. We cannot suppose the parties intended to make such a vain bargain.

We are satisfied that it was a valid contract, containing dependent stipulations to be performed by each before he could compel a performance by the other. It follows, therefore, that the plaintiff was not entitled to the money or price of the land, inasmuch as he neglected to offer to convey the land by a proper deed.

We are all of opinion that the default should be taken off, and that the plaintiff should be non-suited.

QUESTIONS

1. Why did the court non-suit the plaintiff in his action on the defendant's note?
2. What should the plaintiff have alleged and proved to have established defendant's liability on the note?
3. Suppose that the defendant had been suing the plaintiff for his refusal to convey the land, what would he have had to allege and prove in order to have recovered?
4. Was the defendant's promise to pay money an absolute, unconditional promise? If not, upon what condition or conditions did it depend?
5. P covenants to convey Blackacre to D. D agrees to pay $5,000 for the land. Before P can recover the purchase price from D, what must he allege and prove? Why?
6. D agrees to convey Blackacre to P, P agrees to pay $5,000 for it, on January 1. On January 1, P tenders $5,000 to D, which D refuses. What are P's rights against D?
7. On January 1, neither party does anything. What are P's rights against D on January 2?
8. On January 1, neither party does anything. What are P's rights against D on March 1?

BAKER *v.* HIGGINS

21 New York Reports 397 (1860)

Appeal from the Supreme Court. Action to recover for brick sold and delivered. The trial was before a referee, who received parol evidence of a contract for the sale of brick. It subsequently

appearing that the contract was put in writing, the defendant moved that the parol evidence of its tenor should be stricken out. To the referee's refusal to strike out the evidence and to his refusal to nonsuit the plaintiff, the defendant took exceptions. The referee, in his findings of facts, found in accordance with the parol evidence that the defendant agreed to pay for the brick as fast as delivered. Judgment for the plaintiff upon his report having been affirmed at general term, the defendant appealed to this court.

WELLES, J. On the trial before the referee, the plaintiff gave evidence tending to show that, by the contract between him and the defendant for the sale and delivery of the brick in question by the former to the latter, the brick was to be paid for as it was delivered. It also appeared, on the part of the plaintiff, that at the close of the conversation between the parties by which the contract was negotiated, the plaintiff wrote something on a piece of paper and handed it to the defendant, upon which the parties separated. None of the plaintiff's witnesses were able to state what the writing contained. The defendant produced and identified the paper, which turned out to be as follows: "I will deliver John Higgins 25,000 pale brick, on the dock at East Troy, for $3 per M, and 50,000 hard brick, at the same place, at $4 per M cash. E. W. Baker, Caxsackie." This, I think, was a valid agreement, and must be deemed and taken as the agreement then made between the parties in relation to the brick, and under which a part was afterward delivered.

Not long after this agreement the plaintiff delivered to the defendant, at Troy, under the written contract, a cargo of brick consisting of 10,500 hard and 10,500 pale bricks, and demanded payment for that quantity, which the defendant refused until the whole was delivered. This I think he had a right to do. The contract was entire to deliver 75,000 bricks, and plaintiff was not entitled to pay for any part until the whole was delivered, or until he was ready and offered to deliver the balance, which the plaintiff has not done. The action was brought for the contract price of the 21,000 bricks delivered; and the referee found, contrary to the legal import of the written agreement, that the bricks were to be paid for on delivery, as the same should be delivered. For this error the judgment should be reversed, and a new trial directed in the court below, with costs to abide the event.

Judgment reversed and a new trial ordered.

QUESTIONS

1. What error did the referee commit in the trial of this case in the court below? What rule of law did the supreme court lay down in its decision?
2. Suppose that it had been expressly agreed that the bricks should be paid for as delivered, what would have been the decision of the court in this case?
3. Did the plaintiff agree to wait until all the bricks were delivered before receiving pay for them? If he made no such promise, why was he not entitled to recover for the bricks as delivered?
4. Suppose that the plaintiff had made a tender of performance and that the defendant had refused to accept it, what would have been the rights of the plaintiff against the defendant?
5. P agreed to sell and deliver 500 tons of coal to D, in five equal instalments, which D agreed to accept and pay for. What are P's rights, if any, against D after the delivery of the first instalment?
6. P promised to work for D for a year at the rate of $100 a month. P sues D at the end of the first month for $100. What decision?
7. On December 1, 1920, D promised P the sum of $500, to be paid on January 1, 1921, for P's promise to write a certain book. On January 1, 1921, P sues D for $100. What decision?
8. P agrees to convey Blackacre and deliver a deed to it to D upon the payment of the purchase price in ten equal instalments. D promises to accept the conveyance and to pay the purchase price in the manner stated. P sues D for three instalments which are due and unpaid. What decision?
9. D has paid all but the last instalment. P sues D for this instalment, without alleging performance or tender of performance. What decision?
10. All ten instalments are due and unpaid. What are P's rights against D?

LEOPOLD *v.* SALKEY

89 Illinois Reports 412 (1878)

This was an action by the appellee against the appellants upon a written contract, under seal, whereby the former agreed to render personal services for the latter, during a stipulated term, for a price agreed to be paid by the latter.

By the terms of the contract, appellee agreed to enter the employ of appellants as a superintendent and manager of the manufacturing department of appellants (they being engaged in the manufacturing

and selling of boys', youths', and children's clothing), in connection with, and under the direction of Asher F. Leopold, and whenever required by appellants' firm or either member thereof, to assist in the purchase and sale of materials and goods manufactured by the firm, in such manner and at such times as the firm should direct. Appellee also agreed that he would continue in the employ of the firm for a period of three years from the 1st of December, 1874, at which time his services were to commence; that during said time, he would devote himself entirely to the business of the firm, in the manner agreed upon, giving his whole time, attention, and skill thereto, and at all times work for the best interests of appellants.

Appellants, as compensation therefor, agreed to pay appellee the sum of $3,000 per annum, in sums of $250 per month, at the expiration of each month.

Appellee commenced work, under the contract, on the 1st of December, 1874, and continued to render services thereunder until the 12th of January, 1875, when he was arrested by a United States marshal, under an order of the District Court of the United States for the Northern District of this state, and put in jail. He remained in jail until the 25th of the same month, when he was released on bail. Upon being released, he returned to appellants' establishment to resume work under the contract, but they, having obtained another foreman in his place while he was in jail, refused to receive him again in their employ. Appellee has been paid for all the services he actually rendered, and the present suit is only to recover damages for appellants' alleged breach of contract in not continuing him in their employ.

The judgment below was in favor of the appellee for $500.

SCHOFIELD, J. The covenants of appellee clearly constitute but one single and entire undertaking—each goes to the whole consideration. The covenant of appellants to pay $3,000 per annum, although to be paid in monthly instalments, was not for a part, but for the whole, of the term. The covenant by appellee that he would devote himself entirely to the business of the firm, giving his whole time, attention, and skill thereto, goes to the root of the whole matter, and when the situation of the parties, as disclosed by the evidence, is taken into consideration, it is manifest that the failure by appellee to perform his contract from the 12th to the 25th of January, inclusive, would render the performance of the rest of the contract by appellee a thing different in substance from that which appellants

stipulated for. Appellants were engaged in an extensive business in the manufacturing and selling of boys', youths', and children's clothing. The month of January was their busiest season of the year. In that month they manufactured their goods for the spring trade, and in the latter part of it they sent out their traveling men with samples. When appellee was arrested, there were in appellants' employ fourteen cutters and three trimmers. It was his duty, as superintendent and manager, to superintend these, lay out their work, direct its performance, and also to inspect and receive work from the tailors, besides discharging various other duties incident to the position assumed. It required peculiar skill, knowledge, and great promptness and fidelity. To delay the manufacturing in that month would, obviously, work immediate pecuniary loss, to some extent, and must, necessarily, endanger the future prosperity of the business. Rival manufacturers would be enabled to forestall appellants in the trade of that year, and being once forestalled, they might not, during the term, recover their former trade; besides the character and quality of work have much to do in building up and establishing a prosperous, permanent trade in manufactured articles, and great risk, in that respect, would be incurred by the mere change of superintendents and managers; nor is it to be assumed that a person of competent experience, skill, energy, and fidelity could be got, without a moment's warning, to fill such a position, and induced to stay, from day to day during such a season in the business, for a compensation approaching in any reasonable degree a pro rata part of that which he would be willing to accept for his services for a term of three years.

In our opinion, therefore, the failure of appellee to perform the services he had covenanted to perform, from the 12th to the 25th of January, 1875, was a substantial breach of his covenant.

It may be conceded that appellee was put in jail without his fault, yet, this would not relieve him of his covenant to give his whole time, attention, and skill to appellants' business. It is not claimed to have been through appellants' fault that he was put in jail, and there is no reason, therefore, why appellants' business should suffer in consequence of it. He (appellee) might have guarded against this by an exception in his covenant, but he did not do so.

There is a class of cases, where a party contracting to render personal services, after part performance, becomes disabled by inevitable casualty and is thereby prevented from fully completing his contract,

has been held entitled to recover for the services actually rendered, upon a *quantum meruit*. *Fenton* v. *Clark*, 11 Vt. 557; *Hubbard* v. *Belden*, 27 *id.* 645; *Dickey* v. *Linscott*, 20 Me. 453; *Wolf* v. *Hewes*, 20 N.Y. 197. But these furnish no warrant for the position that the laborer can, in such case, recover upon the contract for a failure to pay for future services which he has been prevented from performing. On the contrary, they proceed upon the theory that the contract is discharged by the inevitable casualty, and therefore allow the party to recover simply for what he has earned.

Another class of cases may be found, where a party attempting to rescind a contract on account of the default of the opposite party, is held precluded by his acceptance of the property, labor, etc., of the opposite party. But such cases can have no application here. In those cases it is required that it shall be in the power of the party to abandon the materials or product of labor received and rescind the contract *in toto*, without an abandonment of his own property, and his failure thus to abandon them is construed as an acceptance of performance. See *Eldridge* v. *Rowe*, 2 Gilm. 91.

Where neither party is at fault, the absence of the servant from the master's employ, without his consent (by whatever cause occasioned), for an unreasonable length of time, we are of opinion, authorizes the master to treat the contract as abandoned; and what, in such case, is an unreasonable length of time, depends upon the nature and necessities of the business in which the servant is employed. Under the facts here proved, a much shorter time than that during which appellee was confined in jail, might, in our opinion, be regarded as unreasonable. Under different circumstances, absence for a much greater length of time might furnish no cause for abandonment, the question always being, does the delay so affect the interests of the master that the performance of the residue of the contract by the servant would be a thing different in substance from what the master contracted for.

When appellants refused to receive appellee into their employ, upon his return to their place of business, he was fully and sufficiently notified of their election to treat the contract as abandoned, and he needed no other or different notice.

Inasmuch as the rulings and judgment of the court below are not in harmony with the views here expressed, the judgment is reversed and the cause remanded.

Judgment reversed.

QUESTIONS

1. What was the issue under consideration in the principal case? How was the issue decided? What rule of law can be deduced from this decision?
2. Suppose that the action had been for compensation which the plaintiff had earned previous to his arrest and incarceration, what would have been the decision of the court?
3. Suppose that the plaintiff had been in jail only three days, what would have been the decision of the court in an action by the plaintiff against the defendant for a breach of the contract?
4. Suppose that the defendants had been suing the plaintiff for a breach of the latter's contract to serve the former as a foreman, what would have been the decision?
5. D employs P to do a certain piece of work, to begin January 1. On December 27, P becomes ill. D notifies P that the contract is at an end and that he has engaged X to do the work. P sues D for damages. P can prove the following facts: (*a*) That his sickness was not serious. (*b*) That a substitute could easily have been engaged for the period of his absence. (*c*) That ten or fifteen days' delay in beginning performance of the work would not have seriously interfered with D's business. What decision?
6. P and D entered into a contract of employment for a period of one year. D discharged P from his employ without assigning any cause. P was highly inefficient, but D did not know of his inefficiency at the time he discharged him. P sues D for damages. What decision?
7. P contracts in writing to sell a house and lot to D. Before the execution and delivery of the deed, the house burns without the fault of either party. P tenders a deed to the lot and demands the purchase price from D. D refuses to accept the conveyance. What decision in a bill for specific performance by P against D?

NORRINGTON *v.* WRIGHT

115 United States Reports 188 (1885)

This was an action of assumpsit, brought by Arthur Norrington, a citizen of Great Britain, trading under the name of A. Norrington & Co., against James A. Wright and other citizens of Pennsylvania, trading under the name of Peter Wright & Sons, for the breach of a contract by the terms of which the defendants agreed to purchase and pay for 5,000 tons of iron rails. There was a verdict and judgment for the defendants in the court below. The plaintiff sued out a writ of error to the Supreme Court.

GRAY, J. In the contracts of merchants, time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which that term is used in insurance and maritime law, that is to say, a condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract.

The contract sued on in this case is a single contract for the sale and purchase of 5,000 tons of iron rails, shipped from a European port or ports for Philadelphia. The subsidiary provisions as to shipping in different months, and as to payment for each shipment upon its delivery, do not split up the contract into as many contracts as there should be shipments or deliveries of so many distinct quantities of iron. The further provision, that the sellers shall not be compelled to replace any parcel lost after shipment, simply reduces in the event of such loss the quantity to be delivered and paid for.

The times of shipment, as designated in the contract, are "at the rate of about 1,000 tons per month, beginning February, 1880, but the whole contract to be performed before August 1, 1880." These words are not satisfied by shipping one-sixth part of the 5,000, or about 883 tons, in each of the six months which begin with February and end with July. But they require about 1,000 tons to be shipped in each of the five months from February to June, inclusive, and allow no more than slight or unimportant deficiencies in the shipments during those months to be made up in the month of July. The contract is not one for the sale of a specific lot of goods, identified by independent circumstances, such as all those deposited in a certain warehouse, or to be shipped in a particular vessel, or that may be manufactured by the seller, or may be required for use by the buyer in a certain mill, in which case the mention of the quantity, accompanied by the qualification of "about" or "more or less," is regarded as a mere estimate of the probable amount, as to which good faith is all that is required of the party making it. But the contract before us comes within the general rule: "When no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material, and governs the contract. The addition of

the qualifying words 'about,' 'more or less,' and the like, in such cases, is only for the purpose of providing against accidental variations, arising from slight and unimportant excesses or deficiencies in number, measure or weight." *Brawley* v. *United States*, 96 United States Reports, 168, 171, 172.

The seller is bound to deliver the quantity stipulated for and has no right either to compel the buyer to accept a less quantity, or to require him to select part out of a greater quantity; and when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month gives the buyer the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should be delivered at once.

The plaintiff instead of shipping about 1,000 tons in February and about 1,000 tons in March, as stipulated in the contract, shipped only 400 tons in February and 835 tons in March. His failure to fulfill the contract on his part in respect to these first two instalments, justified the defendants in rescinding the whole contract, provided they distinctly and seasonably asserted the right of rescission.

The defendants, immediately after the arrival of the March shipments, and as soon as they knew that the quantities which had been shipped in February and in March were less than the contract called for, clearly and positively asserted the right to rescind, if the law entitled them to do so. Their previous acceptance of the single cargo of 400 tons shipped in February was no waiver of this right, because it took place without notice, or means of knowledge, that the stipulated quantity had not been shipped in February. The price paid by them for that cargo being above the market value, the plaintiff suffered no injury by the omission of the defendants to return the iron; and no reliance was placed on that omission in the correspondence between the parties.

The case wholly differs from that of *Lyon* v. *Bertram*, 20 Howard, United States Reports, 149, in which the buyer of a specific lot of goods accepted and used part of them with full means of previously ascertaining whether they conformed to the contract.

The plaintiff, denying the defendants' right to rescind, and asserting that the contract was still in force, was bound to show such performance on his part as entitled him to demand performance on their part, and, having failed to do so, cannot maintain this action.

For these reasons, we are of the opinion that the judgment below in favor of the defendants should be affirmed.

QUESTIONS

1. Suppose that the defendant had accepted the first two instalments and had brought an action against the plaintiff for damages because of his failure to deliver the iron rails as promised, what would the court have decided?
2. Suppose that the plaintiff had shipped 1,200 tons in February and 1,500 tons in March, what would have been the rights of the defendant?
3. Suppose that the plaintiff had shipped substantially the amount called for in each instalment, but that the quality of the iron rails was below specifications, what would have been the rights of the defendant?
4. Suppose that the 400 tons shipped in February and the 833 tons shipped in March had been lost in transit, upon whom would the loss have fallen?
5. P agrees to sell and deliver 1,000 tons of coal to D which D agrees to accept and pay for. The coal is to be delivered in five equal instalments. P delivers the first instalment according to his promise. D refuses to pay for it upon delivery. What are P's rights under the contract?
6. Compare this case with the case of *Baker* v. *Higgins*, *supra*, p. 379.

WINDMULLER *v.* POPE

107 New York Reports 674 (1887)

This was an action to recover damages for alleged breach of a contract to purchase a quantity of iron. In January, 1880, the parties entered into a contract for the sale by the plaintiffs and purchase by the defendants of "about twelve hundred tons of old iron, Vigno rails, for shipment from Europe at sellers' option, by sail or steam vessels to New York, Philadelphia, or Baltimore, at any time from May 1 to July 15, 1880, at thirty-five dollars per ton, deliverable at either of the above ports on arrival." On or about June 12, 1880, defendants notified plaintiffs that they would not receive or pay for the iron or any part of it, and advised that plaintiffs better stop at once in attempting to carry out the contract. The plaintiffs thereupon sold the iron abroad which they had purchased to carry out the contract. Judgment was given for the plaintiff.

PER CURIAM. We think no error is presented upon the record which requires a reversal of the judgment. The defendants having on the 12th of June, 1880, notified the plaintiffs that they would not receive rails or pay for them, and having informed them on the next day that if they brought the iron to New York they would do so at

their own peril, and advised them they had better stop at once attempting to carry out the contract, so as to make the loss as small as possible, the plaintiffs were justified in treating the contract as broken by the defendant at that time, and were entitled to bring the action immediately for the breach, without tendering the delivery of the iron, or awaiting the expiration of the period of performance fixed by the contract; nor could the defendants retract their renunciation of the contract after the plaintiffs had acted upon it and, by a sale of the iron to other parties, changed their position. (*Dillon* v. *Anderson*, 43 N.Y. 231; *Howard* v. *Daly*, 61 *id.* 362; *Ferris* v. *Spooner*, 102 *id.* 12; *Hochster* v. *De La Tour*, 2 El. & Bl. 678.)

The ordinary rule of damages in an action by a vendor of goods and chattels, for a refusal by the vendee to accept and pay for them, is the difference between the contract-price and the market value of the property at the time and place of delivery. (*Dana* v. *Fiedler*, 12 N.Y. 40; *Dustan* v. *McAndrew*, 44 *id.* 72; *Cahen* v. *Platt*, 69 *id.* 348.)

Judgment affirmed.

QUESTIONS

1. Had the time for performance of the contract in the principal case come? If not, upon what theory did the court permit the plaintiffs to recover damages from the defendants?
2. A person cannot be held liable for a breach of a contract until he has been guilty of some default under it. Of what default were the defendants in this case guilty?
3. Suppose that the defendants, on July 16, had brought an action against the plaintiffs for their failure to deliver the iron as they had agreed, what would have been the decision of the court?
4. What are the legal consequences of an announcement by one party to a contract, before the time set for performance, that he will not perform? What may the other party to the contract do when he has received notice of such repudiation?
5. P and D enter into a contract, performance of which is to begin two months later. One month later, D writes to P: "Due to unexpected causes, it does not seem as if I shall be able to carry out my agreement with you." P immediately brings an action against D. D contends that the action is prematurely brought. What decision?
6. D borrowed 50 tons of ice from P in 1919, when the price of ice was $2.50 a ton, and agreed to return an equal amount of ice during the following season. In July of 1920, when ice was worth $7.50 a ton, P demanded a fulfillment of D's promise. D wrote in reply: "I do

not know whether I can return the ice or not. It seems unfair to compel me to do so. I will not return it unless the price of ice falls to $2.50 a ton." P immediately sues D for a breach of contract. D contends that the action is prematurely brought. What decision?

7. D is under a contract to sell and deliver corn to P on December 1. On August 1, he tells P that he will not be able to perform his contract on December 1. What are the rights of P on August 2?
8. D executes a negotiable promissory note, promising to pay P or order the sum of $500 on January 15. On January 1, D states to H, the holder of the note, that he does not intend to pay it. H immediately brings an action against D on the note. What decision?

CLARK *v.* MARSIGLIA

1 Denio's New York Reports 317 (1845)

Assumpsit for work, labor, and material. Plea, non-assumpsit. Judgment for the plaintiff. The defendant brings error.

The defendant delivered a number of paintings to the plaintiff to be cleaned and repaired at a specified price for each. After the plaintiff had begun work on them, the defendant directed him to stop, but plaintiff persisted and claims to recover for the whole. The court charged that as the plaintiff had begun work, he had a right to finish and that the defendant could not revoke the order.

PER CURIAM. The question does not arise as to the right of the defendant below to take away these pictures, upon which the plaintiff had performed some labor, without payment for what he had done, and his damages for the violation of the contract, and upon that point we express no opinion. The plaintiff was allowed to recover as though there had been no countermand of the order; and in this the court erred. The defendant, by requiring the plaintiff to stop work upon the paintings, violated his contract and thereby incurred a liability to pay such damages as the plaintiff should sustain. Such damages would include a recompense for the labor done and materials used, and such further sum in damages as might, upon legal principles, be assessed for the breach of the contract; but the plaintiff had no right, by obstinately persisting in the work, to make the penalty upon the defendant greater than it would otherwise have been.

To hold that one who employs another to do a piece of work is bound to suffer it to be done at all events, would sometimes lead to great injustice. A man may hire another to labor for a year, and

within the year his situation may be such as to render the work entirely useless to him. The party employed cannot persist in working, though he is entitled to the damages consequent upon his disappointment. So if one hires another to build a house, and subsequent events put it out of his power to pay for it, it is commendable in him to stop the work, and pay for what has been done and the damages sustained by the contractor. He may be under a necessity to change his residence; but upon the rule contended for, he would be obliged to have a house which he did not need and could not use. In all such cases the just claims of the party employed are satisfied when he is fully recompensed for his part performance and indemnified for his loss in respect to the part left unexecuted; and to persist in accumulating a larger demand is not consistent with good faith toward the employer. The judgment must be reversed, and a *venire de novo* awarded.

Judgment reversed.

QUESTIONS

1. What was the issue under consideration in the principal case? How was this issue decided? What rule of law can be deduced from the decision?
2. Do you conclude from this decision that a person has the right to break a contract? If not, why was the plaintiff not entitled to finish the work and recover for all of his services?
3. P is under a contract to serve D in a certain capacity for one year. Before the time set for beginning performance, D notifies P that he does not need P's services. P accepts the breach. (*a*) P continues to make preparation for performance. (*b*) He sits idly by and does nothing. (*c*) He secures a more remunerative contract with X for the year in question. What are P's rights against D under each hypothesis when the day set for beginning performance arrives?
4. (*a*) P sits idly by and does nothing during the year in question. (*b*) He is more remuneratively employed by X for that year. What are his rights against D at the end of the year?
5. Assume in Question 3 that P does not accept the breach, what are his rights against D under each hypothesis stated?
6. What constitutes an acceptance by P of the breach by D? Does P have to accept and act on the breach by D? Suppose that he does not accept the breach, what is the effect of his non-acceptance?
7. D is under a contract to sell goods to P on January 1. On November 15, D notifies P that he does not intend to deliver the goods as promised. To this announcement P replies: "I shall expect you to perform

your contract." On December 1, D wrote to P: "It is my present intention to sell and deliver to you the goods according to our original agreement." On December 5, P brought an action against D for breach of the contract. What decision?

SCHOOL DISTRICT OF SHERMAN COUNTY *v.* HOWARD

5 Nebraska Unofficial Reports 340 (1904)

DUFFIE, C. Howard was employed by the school district as a teacher for the period of nine months at fifty dollars a month, the district to furnish the services of a janitor. After eight months of the term had expired the school was closed by order of the board of health of the village of Ashton on account of the prevalence of smallpox, and Howard, although ready and willing to complete his contract, was unable to do so in consequence of such order. In this action, he sues the school district for one month's wages and also for money advanced by him to pay for janitor services which the district failed to furnish. The district offered to confess judgment for the sum of sixteen dollars, the amount claimed by Howard on account of payment for janitor services, but defended against his claim for one month's wages upon the ground that the district was prevented from fully carrying out its contract by order of the board of health. Judgment went in favor of Howard and the district has taken error in this court.

Plaintiff in error insists that full performance of the contract on the part of the district was rendered impossible by law, and asserts that under such circumstances it is not liable. It is clearly settled by innumerable authorities that whenever a contract which was possible and legal at the time it was made becomes impossible by the act of God or illegal by the ordinance of the state, the obligation to perform it, is discharged. *Baylies* v. *Pettyplace*, 7 Mass. 325; 9 Cyc. 629. No contract can be carried into effect which was originally made contrary to the provisions of law or which, being made consistently with the rule of law at the time, has become illegal by virtue of some subsequent law. This is so well settled and so thoroughly understood by the profession that a citation of authorities is unnecessary. It is not claimed that the board did not have the authority to close the school or that the order was illegal in any respect. This being so, that order, so long as it remained in force, was a valid legal

prohibition against the continuance of the school and the district by force of law was unable to complete its contract. Had the board failed to act and had the school been closed by the district on its own motion, then the rule contended for by the defendant in error and followed in the case of *Dewey* v. *Union School District of the City of Appena*, 5 N.W. Rep. (Mich.) 646, and *Libby* v. *Inhabitants of Douglas*, 55 N.E. Rep. (Mass.) 808, might be invoked. But the action of the district in closing the school was not voluntary. It was the act of law which the district and all others were compelled to obey. In *Baylies* v. *Pettyplace*, *supra*, it was held that where the law interposes to prevent the performance of a contract, but such prohibition is temporary only, that the parties are not excused from its performance after the law has ceased to operate. Whether this rule should apply to a contract for personal services in all cases we are not called upon to determine; but even if it should be applied in this case the district would still not be in default as it offered to allow the defendant in error to teach the remaining month of his term after the order of the board of health had been recalled.

We think that the court was wrong in finding for the defendant in error and recommend that the judgment be reversed and the case dismissed.

Reversed and dismissed.

QUESTIONS

1. What was the issue under consideration in the principal case? How was the issue decided? What rule of law can be deduced from this decision?
2. Suppose the the School District itself had closed the school because of smallpox, what would have been the decision of the court in an action by plaintiff against the District?
3. D is under a contract to sell and deliver to P 5,000 steel rails, to be delivered on July 1. P sues D for his failure to perform. D proves by way of defense that it was impossible for him to perform because of a strike in his plant during the months of May and June. What decision?
4. D is under a contract with P to build, and have ready for occupancy, a house by April 1. P sues D for his failure to perform. D by way of defense proves impossibility of performance due to unprecedented cold weather. What decision?
5. P and D enter into a contract with each other. It becomes impossible of performance (*a*) because of P's conduct; (*b*) because of D's conduct. What decision in an action by P against D under each hypothesis?

6. P enters into a contract of employment with D and agrees that if he leaves D's employment without giving thirty days' notice he shall receive nothing for services unpaid for at that time. P was convicted and sentenced to jail for three months because of disorderly conduct. P sues D for wages due when he was arrested. What decision?
7. D is under a contract to serve P in a certain capacity for a year. During the year, D is absent from his work for a month because of sickness. P sues D for a breach of contract. What decision?
8. P and D entered into a contract for the purchase and sale of a horse. A few minutes before the agreement was made, unknown to either of them, the horse had died. P sues D for his refusal to sell and deliver the horse. What decision?

BUTTERFIELD *v.* BYRON

153 Massachusetts Reports 517 (1891)

Action of contract brought in the name of the plaintiff for the benefit of certain insurance companies, for breach of a building contract entered into between the plaintiff and the defendant. Upon the facts the judge directed a verdict for the defendant and reported the case for the determination of this court, such order to be made as the court might direct.

KNOWLTON, J. It is well-established law, that, where one contracts to furnish labor and materials and construct a chattel or build a house on the land of another, he will not ordinarily be excused from performance of his contract by the destruction of the chattel or building, without his fault, before the time fixed for the delivery of it. It is equally well settled, that when work is to be done under a contract on a chattel or building which is not wholly the property of the contractor, or for which he is not solely accountable, as where repairs are to be made on the property of another, the agreement on both sides is upon the implied condition that the chattel or building shall continue in existence, and the destruction of it without the fault of either of the parties will excuse the performance of the contract, and leave no right of recovery of damages in favor of either against the other. *Dexter* v. *Norton*, 47 N.Y. 62; *Walker* v. *Tucker*, 70 Ill. 527. In such cases, from the very nature of the agreement as applied to the subject-matter, it is manifest that, while nothing is expressly said about it, the parties contemplated the continued existence of that to which the contract relates. The implied condition is a part

of the contract, as if it were written into it, and by its terms the contract is not to be performed if the subject-matter of it is destroyed, without the fault of either of the parties, before the time for complete performance has arrived.

The fundamental question in the present case is, what is the true interpretation of the contract? Was the house, while in the process of erection to be in the control and at the sole risk of the defendant, or was the plaintiff to have a like interest as the builder of a part of it? Was the defendant's undertaking to go on and build and deliver such a house as the contract called for, even if he should be obliged again and again to begin anew on account of the repeated destruction of a partly completed building by inevitable accident, or did his contract relate to one building only, so that it would be at an end if the building, when nearly completed, should perish without his fault? It is to be noticed that his agreement was not to build a house, furnishing all the labor and materials therefor. His contract was of a very different kind. The specifications are incorporated into it, and it appears that it was an agreement to contribute certain labor and materials towards the erection of a house on land of the plaintiff, towards the erection of which the plaintiff himself was to contribute other labor and materials, which contributions would together make a completed house. The grading, excavating, stone-work, painting, and plumbing were to be done by the plaintiff.

Immediately before the fire, when the house was nearly completed the defendant's contract, so far as it remained unperformed, was to to finish a house on the plaintiff's land, which had been constructed from materials and by labor furnished in part by the plaintiff and in part by himself. He was no more responsible that the house should continue in existence than the plaintiff was. Looking at the situation of the parties at that time, it was like a contract to make repairs on the house of another. His undertaking and duty to go on and finish the work was upon an implied condition that the house, the product of their joint contributions, should remain in existence. The destruction of it by fire discharged him from his contract. The fact that the house was not in existence when the contract was made is immaterial. *Howell* v. *Coupland*, 1 Q.B.D. 258.

It seems very clear that, after the building was burned, and just before the day fixed for the completion of the contract, the defendant could not have compelled the plaintiff to do the grading, excavating, stone-work, brick-work, painting, and plumbing for another house

of the same kind. The plaintiff might have answered, "I do not desire to build another house which cannot be completed until long after the date at which I wished to use my house. My contract related to one house. Since that has been destroyed without my fault, I am under no further obligation." If the plaintiff could successfully have made this answer to a demand by the defendant that he should do his part toward the erection of a second building, then certainly the defendant can prevail on a similar answer in the present suit. In other words, looking at the contract from the plaintiff's position, it seems manifest that he did not agree to furnish the work and materials required of him by the specifications for more than one house, and if that was destroyed by inevitable accident, just before its completion, he was not bound to build another, or to do anything further under his contract. If the plaintiff was not obliged to make his contribution of work and materials toward the building of a second house, neither was the defendant.

The agreement of each to complete the performance of the contract after a building, the product of their joint contributions, had been partly erected was on an implied condition that the building should continue in existence. Neither can recover anything of the other under the contract, for neither has performed the contracts so that its stipulations can be availed of. The case of *Cook* v. *McCabe*, 53 Wis. 250 was very similar in its facts to the one at bar, and identical with it in principle. There the court, in an elaborate opinion, after a full consideration of the authorities, held that the contractor could recover of the owner a pro rata share of the contract price for the work performed and the materials furnished before the fire. *Clark* v. *Franklin* 7 Leigh, 1, is of similar purport.

What are the rights of the parties in regard to what has been done in part performance of a contract in which there is an implied condition that the subject to which the contract relates shall continue in existence, and where the contemplated work cannot be completed by reason of the destruction of the property without fault of either of the parties, is in dispute upon the authorities. The decisions in England differ from those of Massachusetts, and of most of the other states of this country. There the general rule, stated broadly, seems to be that the loss must remain where it first falls, and that neither of the parties can recover of the other for anything done under the contract. In England on authority and upon original grounds not very satisfactory to the judges of recent times, it is held that freight advanced

for the transportation of goods subsequently lost by the perils of the sea cannot be recovered back. In the United States and in Continental Europe the rule is different. In England it is held that one who has partly performed a contract on property of another which is destroyed without the fault of either party, can recover nothing; and, on the other hand, that one who has advanced payments on account of labor and materials furnished under such circumstances cannot recover back the money. One who has advanced money for the instruction of his son in a trade cannot recover it back if he who received it dies without giving the instruction. But where one dies and leaves unperformed a contract which is entire, his administrator may recover any installments which were due on it before his death.

In this country, where one is to make repairs on a house of another under a special contract, or is to furnish a part of the work and materials used in the erection of a house, and his contract becomes impossible of performance on account of the destruction of the house, the rule is uniform, so far as the authorities have come to our attention, that he may recover for what he has done or furnished. In *Cleary* v. *Sohier*, 120 Mass. 210, the plaintiff made a contract to lathe and plaster a certain building for forty cents per square yard. The building was destroyed by a fire which was an unavoidable casualty. The plaintiff had lathed the building and put on the first coat of plaster, and would have put on the second coat, according to his contract, if the building had not been burned. He sued on an implied assumpsit for work done and materials found. It was agreed that, if he was entitled to recover anything, the judgment should be for the price charged. It was held that he could recover.

The same principle is applied to different facts in *Jones* v. *Judd*, 4 Const. 411, and in *Hargrave* v. *Conroy*, 4 C. E. Green, 281. If the owner in such a case pays in advance, he may recover back his money, or so much of it as was an over-payment. The principle seems to be, that when, under an implied condition of the contract, the parties are to be excused from performance if a certain event happens, and by reason of the happening of the event it becomes impossible to do that which was contemplated by the contract, there is an implied assumpsit for what has properly been done by either of them, the law dealing with it as done at the request of the other, and creating a liability to pay for its value, to be determined by the price stipulated in the contract, or in some other way if the contract price cannot be

made applicable. Where there is a bilateral contract for an entire consideration moving from each party, and the contract cannot be performed, it may be held that the consideration on each side is the performance of the contract by the other, and that a failure completely to perform it is a failure of the entire consideration, leaving each party, if there has been no breach or default on either side, to his implied assumpsit for what he has done.

Judgment for defendant affirmed.

QUESTIONS

1. What was the undertaking of the defendant in this case? Why was he excused from the performance of it?
2. Suppose that the defendant had been suing the plaintiff for the work which he had done toward the erection of the building, what would the decision of the court have been?
3. D contracts to furnish labor and materials, and to build a house for P on his land. When the building is half-finished, it accidentally burns. P sues D for the failure to perform his contract. What decision?
4. P had paid D $2,500 for work done up until the date of payment. After the house burned, P sues to recover the money. What decision?
5. P leases a building to D for one year at $100 per month. At the end of the third month, the building accidentally burns. What are the rights of the parties to the lease?
6. D contracts to sell his crop of turnips to P at a certain price. P sues D for his failure to deliver the turnips. By way of defense, D proves that his turnip crop failed entirely because of unprecedented weather conditions. What decision?
7. D contracts to sell 500 pairs of shoes to P. P sues D for his failure to deliver the shoes. By way of defense, D proves that his factory was accidentally destroyed by fire, rendering performance of the contract impossible. What decision?

6. Discharge of Contracts

COLLYER *v.* MOULTON

9 Rhode Island Reports 90 (1868)

POTTER, J. The plaintiffs made a verbal contract with the defendants, then partners, to build a machine. The work was charged as fast as done, and the materials when furnished. After a small part of the work had been done, the firm was dissolved; and the defendant Moulton, the same day, gave notice of it to the plaintiffs, and told them he could be no longer responsible for the machine. The defend-

ant Moulton claims that the plaintiffs released him and agreed to look to the other partner for payment; but this the plaintiffs deny. The plaintiffs went on and completed the machine, and then sued Bromley alone for his claim, but discontinued the suit, and now sue both the former partners, the writ having been served on Moulton only.

Where two parties contract, one to do a particular piece of work and the other to pay for it, the latter may, at any time countermand the completion of it, and in such case the former cannot go on and complete the work and claim the whole price, but will be entitled only to pay for his part performance, and to be compensated for his loss on the remainder of the contract. *Clark* v. *Marsiglia*, 1 Denio, 317.

In the present case, the two defendants, although the partnership was dissolved, still remain joint contractors so far as the plaintiff was concerned; and we think that either of them had a right to countermand the order before completion, and then the joint contractors would have remained liable as before stated. But the defendant Moulton claims that he was verbally released by the plaintiffs and that the plaintiffs agreed to look to the other defendant, Bromley, alone for their pay.

There is some apparent inconsistency in the language used in the reports and text writers, as to the manner in which a simple contract may be annulled. We think the rule is that so long and so far as the contract remains executory and before breach, it may be annulled by agreement of all parties; but that when it has been broken and a right of action has accrued, the debt or damages can only be released for a consideration; and even so far as it remains executory, it may be said that the agreement to annul on one side may be taken as the consideration for the agreement to annul on the other side.

So far, therefore, as the contract in the present case remained unfinished on the 10th of February, 1865, when the notice was given and the alleged waiver was made, we may consider, either that the contract was annulled or waived by consent, in which case (the machine, so far as completed, being tendered or delivered) the plaintiff could claim only for work and materials to that date without further damages, or that the work was countermanded by the defendant Moulton without the assent of plaintiffs, in which case the defendant would be liable for the part performed and for the loss on the part unperformed.

We consider the present case to fall under the first head, the notice to, and declarations and conduct of the plaintiffs amounting to

a waiver of the fulfillment of the contract as first made, that is, to a release of the defendant Moulton for the part still unperformed.

But the claim for payment for the part performed stands, as we have seen, on a different ground. Was there any agreement to release Moulton from liability for this, i.e., the part performed; and if so, was there any agreement to take the other partner's individual promise in lieu of the promise of the firm, or anything which would amount to a consideration for the release of the firm?

If by mutual agreement between the plaintiff Collyer and the two defendants, Moulton had been released from his liability for the work already done, and a new promise made by Bromley, the other defendant, to pay for it, this would have been a valid release for a valuable consideration—one debt would have been substituted for the other. *Thompson* v. *Percival*, 5 B. & A. 925.

But we cannot find sufficient evidence of any promise on the part of the other partner, Bromley, to assume the liability; and if there was none, then the release of liability for the work already done was without consideration, as it is not claimed that there was any other consideration. We cannot find any count in the declaration upon which, upon this view of the case, we can allow for anything except labor done before February 10th, the day of the giving of the notice.

Judgment for plaintiffs for amount so found due.

QUESTIONS

1. Why was Moulton not relieved of his liability on the contract when the partnership, of which he was a member, was dissolved?
2. The plaintiff's promise to release Moulton from liability on the contract was held binding on him as to the unexecuted part of the contract. Why was his promise not binding on him as to the executed part of the contract?
3. D agrees to sell and P to buy Blackacre. Before the time set for performance they agree to call the contract off. Later, P sues D for failure to convey Blackacre. What decision?
4. D agrees to perform certain services for P, in consideration of P's promise to pay him $50 therefor. D performs the services but tells B that he will waive P's duty to pay for them. Later, D brings an action against P for $50. What decision?
5. D agrees to sell and P agrees to buy 1,000 bushels of wheat. (*a*) D delivers 700 bushels in performance of the contract. (*b*) D delivers 990 bushels. (*c*) D delivers 998 bushels. What are P's rights under the contract in each case?

6. D owes P $100. D tenders P that sum which P refuses to accept, claiming that D owes him $125. What is the effect of the tender?
7. P gives D $100 to paint the barn of the former. P sues D for his refusal to paint the barn. D proves that he offered to paint the barn and that his offer was refused. What decision?
8. P and D enter into a bilateral contract for the purchase and sale of a lot of land. What is the effect of either's refusal to accept a tender of performance from the other?
9. (*a*) D is under a contract to convey land to P. (*b*) He is under a contract to perform personal services for P. (*c*) He is under a contract to pay money to P. (*d*) He is under a contract to buy goods from P. D dies before he performs any of the foregoing contracts. What are the rights of P after D's death?

HEATON *v.* ANGIER

7 New Hampshire Reports 397 (1835)

Assumpsit for a wagon sold and delivered. Verdict for plaintiff, subject to the opinion of the court upon the following case.

The plaintiff, on the 29th of March, 1832, sold the wagon to the defendant at auction for $32.25. Immediately afterward, on the same day, one John Chase bought the wagon of the defendant for $31.25. Chase and the defendant then went to the plaintiff, and Chase agreed to pay the $30.25 to the plaintiff for the defendant, and the plaintiff agreed to take Chase as paymaster for that sum; and thereupon Chase took the wagon and went away.

Green, J. In *Tatlock* v. *Harris*, 3 D. & E. 180, BULLER, J., said: "Suppose A owes B 100 pounds, and B owes C 100 pounds, and the three meet and it is agreed between them that A shall pay C the 100 pounds, B's debt is extinguished, and C may recover the sum from A."

The case thus put by Buller is the very case now before us. Heaton, Angier, and Chase being together, it was agreed between them that the plaintiff should take Chase as his debtor for the sum due from the defendant. The debt due to the plaintiff from the defendant was thus extinguished. It was an accord executed. And Chase, by assuming the debt due to the plaintiff must be considered as having paid that amount to the defendant, as part of the price he was to pay the defendant for the wagon.

The agreement of the plaintiff to take Chase as his debtor was clearly a discharge of the defendant. *Wilson* v. *Copeland*, 5 B. & A. 228; *Wharton* v. *Walker*, 4 B. & C. 163; *Cuxon* v. *Chadley*, 3 B. & C. 591.

A new trial granted.

QUESTIONS

1. What was the nature of the transaction under consideration in the principal case? What were the legal consequences of the agreement?
2. What was the consideration for the plaintiff's promise to accept Chase a debtor in place of the defendant?
3. What was the consideration for the defendant's promise to release Chase from his debt of $31.25?
4. D owes P $100. P executes a sealed instrument, promising to release D from the debt. P later sues D for the $100. What decision?
5. D owes P $100. P covenants not to sue for the amount for one year. What is the effect of this covenant?

KROMER *v.* HEIM

75 New York Reports 574 (1879)

Appeal from order of the General Term of the Superior Court of the City of New York, affirming an order of special term denying a motion on the part of defendant to set aside an execution issued upon judgment herein, and to have the judgment satisfied of record.

On June 24, 1876, plaintiff obtained a judgment herein for $4,334.08. On July 26, 1876, and pending a stay of execution, plaintiff's attorney executed and delivered to defendant a written stipulation, in and by which plaintiff agreed to accept in settlement of the judgment, if paid within a year, $3,000 in cash and an assignment of defendant's interest in a certain patent right and of the assets of such patent business, or to accept $1,000 in cash, $250 down and the balance in instalments, and merchandise to be delivered in amounts stated, sufficient, with the cash payments, to reduce the judgment to $1,000, and an assignment of said patent interests. Defendants paid the $250 down and made the other cash payments and deliveries of merchandise, as specified in the second alternative of the stipulation until the judgment was reduced to less than $1,000, all of which payments were received by the plaintiff without objection. Defendant then executed and tendered to plaintiff an assignment of the patent interests as required, which plaintiff declined to accept but issued an execution to collect the balance of the judgment.

ANDREWS, J. "Accord," says Sir Wm. Blackstone, "is a satisfaction agreed upon between the party injuring and the party injured; which, when performed, is a bar to all actions upon this account." 3 Bl. Com. 15. An accord executory without performance accepted

is no bar; and tender of performance is insufficient. So also accord with part execution cannot be pleaded in satisfaction. The accord must be completely executed to sustain a plea of accord and satisfaction. In *Peytee's* Case (9 Co. 79) it is said: "And every accord ought to be full, perfect, and complete; for if divers things are to be done and performed by the accord, the performance of part is not sufficient, but all ought to be performed." The rule that a promise to do another thing is not a satisfaction, is subject to the qualification that where the parties agree that the new promise shall itself be a satisfaction of the prior debt or duty, and the new agreement is based upon a good consideration, and is accepted in satisfaction, then it operates as such, and bars the action.

An exception to the general rule on this subject has been allowed in cases of composition deeds, or agreements between a debtor and his creditors; and they have been held, upon grounds peculiar to that class of instruments, to bar an action by a separate creditor, who had signed the composition to recover his debt, although the composition agreement was still executory. *Good* v. *Cheeseman*, 2 Barn. & Ad. 335; *Bayley* v. *Homan*, 3 Bing. N.C. 915. The doctrine which has sometimes been asserted is that mutual promises which give a right of action may operate and are good, as an accord and satisfaction of a prior obligation. Where the performance of the new promise was the thing to be received in satisfaction, then, until performance, there is not complete accord; and the original obligation remains in force.

Applying the well-settled principles governing the subject of accords to this case, the claim that the plaintiff's judgment is satisfied cannot be maintained. There is no ground to infer that the agreement of July 26, 1876, was intended by the parties to be or was accepted as a substitute for or satisfaction of the plaintiff's judgment. It was in effect a proposition on the part of the plaintiff, in the alternative, to accept $3,000 in cash, if paid within one year, and the assignment of the patent and avails of the patent business, in full of the judgment of $4,334.08, or to accept $1,000 cash, in instalments, and the balance in merchandise, until the judgment should be reduced to $1,000; and for that balance to accept the assignment of the patent interests.

The defendant had the election between the alternatives presented by the plaintiff. He elected the latter, and paid the $1,000, and supplied the merchandise, until the debt was reduced to $1,000,

and then tendered the assignment of the patent interests, which the plaintiff refused to accept.

The judgment clearly was to remain in force until the satisfaction under the new agreement was complete. It is the case of an accord partly executed. So far as the plaintiff accepted performance, his claim was extinguished. So far as it was unexecuted, the judgment remained in full force; and however indefensible in morals it may be for the plaintiff to refuse to abide by the agreement in respect to the patent interests, he was under no legal obligation to accept the assignment tendered; and he had the legal right to enforce the judgment for the balance remaining unpaid.

It is clear that the right to supply the merchandise was for the benefit of the defendant. The plaintiff gave him the option to pay $3,000 in cash, and assign the patent interests, or to pay $3,334.08 in merchandise and assign the patent interests. The merchandise was to be furnished on "as favorable terms as would be allowed by Hoyt & Co., or New York rates for cash sales." It gave the plaintiff a benefit beyond what he would derive by any purchase in the open market of the same kind of goods. It is quite clear that the defendant preferred to pay $3,334.08 in merchandise to paying $3,000 in cash.

We think that no distinction arises upon the circumstances to take the case out of the general rule, that an unexecuted accord cannot be treated as a satisfaction.

Order affirmed.

QUESTIONS

1. What was the issue under consideration in the principal case? How was the issue decided? What rule of law can be deduced from this decision?
2. Does the defendant have a remedy against the plaintiff for his refusal to accept the assignment of the patent interests?
3. What is meant by an accord? By an accord executory? By an accord executed? By an accord and satisfaction?
4. Why was there not an accord and satisfaction in the principal case?
5. D owes P $500. P says to D: "If you will pay me $200 and give me your horse, I will release you from your debt." D pays the $200 and a few days later tenders the horse to P, which P refuses to accept. P now sued D for $300. What decision?
6. D has a claim of $1,200 against P. He promises to release P from the claim for the latter's promise to give him his automobile. P promises to deliver the automobile to D. Before the machine is delivered, D sues P for $1,200. What decision?

COMMINGS *v.* HEARD

Law Reports 4 Queen's Bench 669 (1869)

DECLARATION containing indebitatus counts for work done and materials provided, for money paid, for the conveyance of goods, for interest and money due on accounts stated, and claiming £400.

Fourth plea: Except as to the sum of £145 3*s*. 1*d*., parcel of the money claimed, the defendant says that the plaintiff ought not to be admitted or received to claim or allege that at the commencement of this suit any more than the sum of £145 3*s*. 1*d*. was due from the defendant to the plaintiff in respect of the causes of action in the declaration mentioned, because the defendant says that after the accruing of the causes of action in the declaration mentioned, and before this suit a dispute arose between the plaintiff and the defendant as to how much was due from the defendant to the plaintiff in respect of the causes of action, and thereupon by agreement made between them before this suit they referred the question of how much was due from the defendant to the plaintiff in respect of the causes of action to the award of William Wills, and agreed to be bound by his award as to such amount, and that afterwards, and before this suit, the said William Wills, having taken upon himself the burden of the arbitration, and having heard and considered all that the plaintiff and defendant respectively had to allege, and all the evidence which they had to produce concerning the premises so referred to him aforesaid, and thereby awarded that the amount due from the defendant to the plaintiff in respect to the causes of action was £145 3*s*. 1*d*. Demurrer and joinder.

LUSH, J. This was a demurrer to a plea. It is to be observed that the plea does not profess to be an answer to the entire claim, but to the excess over and above the amount of £145. The question is, whether the plaintiff is concluded by the award from alleging that the entire amount was due to him. I am of opinion that he is concluded, and that the award is binding between the parties in all matters which it professes to decide. It was contended that an award is not an estoppel, that the parties are not concluded by an award, and that it is distinguishable from a judgment, which it is admitted would have bound the parties. The contention was that it was so distinguishable because an award was an adjudication by a tribunal appointed by the parties, and not one constituted by the sovereign power within the realm. It is impossible, to my mind, to

suggest any good ground of distinction between these two, when we consider that the reason why a matter once adjudicated upon is not permitted to be opened again is because it is expedient that there should be an end to litigation. When once a matter has been decided between parties, the parties ought to be concluded by the adjudication, whatever it may be. I am at a loss to suggest any reason that would be applicable to the one, that would not be applicable to the other tribunal.

Several cases were cited which it was supposed were authorities in favor of the plaintiff, but which, I think, may be contended to be clearly authorities in favor of the defendant. It is not a new doctrine that an award is a bar. That is found in Comyn's digest, Tit. Accord. D. 1, and there are several instances of it to be found in the books. The case of *Allen* v. *Milner*, 2 C. & J. 47, was relied on, on the part of the plaintiff. When that case is examined it will be found to differ from the present in a most essential particular. There the money demand had been referred to arbitration. The arbitrator has found a given sum to be due from one to the other. The case was a money demand, as this is; the action was brought on the original consideration, but the plea, unlike the plea in this case, set up the award as a bar to the entire action. The plea was held bad, and for this reason, that an award upon a money claim does not alter the nature of the original debt; it leaves it remaining due. The amount which the arbitrator found to be due was for the original consideration. The award did not change the nature of the debt, consequently a plea which professed to answer the whole and admitted a part of it was due, was a bad plea. That is the ground of that decision.

On the other hand, it is settled, where the claim is one for unliquidated damages, an award which settles the amount may be pleaded in bar to the entire action, although the plea, on the face of it, shows that the money is not paid. In the case of *Gascoyne* v. *Edwards*, 1 Y. & J. 19, there was a general plea pleaded to the whole declaration, by which it was alleged that the parties had agreed to refer the amount of the damages to arbitration, and an award had been made, by which it was awarded that the defendant should pay the plaintiff £5 to put the premises in repair. The plea, although it did not aver that the £5 was paid, was held to be a good plea because an award, fixing the amount and creating a debt between the parties, extinguished the original demand for unliquidated damages. The principle upon

which this was held a good plea is, that an award, professing to determine the matter, is binding upon both parties, and it as much precludes the parties from alleging anything contrary to the award as a judgment would, on the ground that it is *res judicata*. If this action had been brought upon the award, it is clear the defendant would be precluded from saying the £145 was not due, because the arbitrator found it was. Why is not a plaintiff equally prohibited from alleging that more is due when the amount has been found by the arbitrator? Each must be concluded by the finding. It is elementary knowledge that an award, good on the face of it, is binding and conclusive upon both parties to it until it is set aside. Nothing appears on the face of this plea to show that the award is not perfectly good. It professes to adjudicate upon all matters referred, and it has decided finally the whole matter. In answer to the argument that the award may be bad, it is enough to say that if the award is bad it might be shown by a replication setting it out. If it is not bad on the face of it, then the parties not having moved to set it aside, it stands, and each party is prohibited from objecting to it. The plea is a perfectly good plea, and our judgment must be for the defendant.

The plea, no doubt, is in an unusual form, because it is pleaded by way of estoppel. It begins in the ordinary way of a plea of estoppel, that the plaintiff ought not to be admitted or received to say so and so. That I consider immaterial. The award is a bar, and it concludes the parties.

Judgment for the defendant.

QUESTIONS

1. What issue was under consideration in this case? How did it arise? Was it an issue of law or an issue of fact? What rule of law can be deduced from the decision?
2. P and D agree to submit a controversy to X and Y for arbitration. Before the arbiters have published their award, D notifies all parties concerned that he does not intend to be bound by the award. What are P's rights under the circumstances?
3. P sues D for an injury caused by D in an automobile accident. D, by way of defense, proves (*a*) that an agreement was entered into between them to submit the question of liability to X and Y for decision; (*b*) that P brought this action for damages before the arbiters had acted. What decision?
4. In the foregoing case, it was agreed that no action should be brought for damages until the arbiters had published an award. What decision

in an action by P against D for damages, brought before publication of the award?

5. In Question 3, it was agreed that no action should be brought for damages and that the award of X and Y should be conclusive on the parties both as to liability and as to extent of liability. The arbiters decide that D is liable and assess P's damages at $300. P thereupon brings an action against D for $2,500. D pleads the award in defense. What decision?
6. In Question 3, D's liability was admitted and the only question which was submitted to X and Y for arbitration was as to the amount of damages to which P was entitled. The arbiters met and decided that P was entitled to $250. P thereupon brought an action against D for $1,500. D pleads the award in defense. What decision?
7. P sells a consignment of goods to D. A controversy arises between them as to the purchase price agreed upon. The controversy was submitted to X and Y for decision. They reported that D owed P $750 for the goods. P sues D on the original transaction for $900. Has D any defense? What decision in the action?
8. Why should parties to commercial controversies not be permitted to settle them finally and conclusively by arbitration? To what extent have organizations been legalized for the purpose of settling commercial disputes outside the court room?

CHAPTER V

THE RELATION OF PRINCIPAL AND AGENT

1. Introductory Topics

One of the most significant, pervasive, and, perhaps, obvious facts in the study of modern industrial society is the well-nigh universal utilization of agency as an organization device in the conduct of business. So universal is this fact that it can scarcely be more than an interesting speculation to inquire how far business activities are carried on by those acting in representative capacities. One simply cannot visualize our present society, its organization, its functions, and its workings without recognizing the fundamental hypothesis that persons may indefinitely extend their personalities and multiply their activities through servants, agents, and other representatives.

Agency is a basic principle underlying all forms of business association. The nature and characteristics of partnerships, joint-stock companies, and corporations can be understood only in terms of this fundamental hypothesis that one person can act for and in the place of another. Each of these organization devices, of course, is marked by features more or less peculiar to itself, but in the final analysis each is based upon the relation of principal and agent.

Because of the all-pervasive character of agency as an organization device, because it is basic in all forms of business association, it is desirable, if not necessary, for business students to make a study of some of its legal aspects and consequences.

Agency may be defined as a relation in which one person, called the agent, acts for and in the place of another, called the principal. It is a relation in which one person deals in a representative capacity for another and not for himself. The Law of Agency treats of the consequences which arise in connection with the creation, operation, and termination of this relation.

The Law of Agency is essentially, on the one hand, a continuation of the Law of Contracts and, on the other hand, a continuation of the Law of Torts. A person, while acting in a representative capacity, enters into a contract with a third person. Who is to be held liable on this agreement? Is the principal, who authorized the act, solely

liable on it? Is the agent, who made the agreement, answerable to the third person? Are principal and agent jointly bound by the agreement? This same person does some act, other than the making of a contract, which prejudicially affects a third person. Assuming that someone should respond to the third person for the injury, must he look exclusively to the principal for indemnity? Must he look exclusively to the agent? Can he hold them jointly for the wrong? These are typical of the questions which arise in connection with the operation of the relation of principal and agent and are highly important for one who would have an appreciation of the legal aspects of the business man's relation to the form of his business unit.

2. Creation of the Relation of Principal and Agent

LYON & CO. *v.* KENT, PAYNE & CO.

45 Alabama Reports 656 (1871)

PETERS, J. Anyone except a lunatic, imbecile, or child of tender years may be an agent for another. It is said by an eminent author and jurist, that "it is by no means necessary for a person to be *sui iuris*, or capable of acting in his or her own right in order to qualify himself or herself to act for others. Thus, for example, monks, infants, *femes covert*, persons attainted, outlawed or excommunicated, villains and aliens, may be agents for others": Story's Agency, §§ 6, 7, 9. So, a slave, who is *homo non civilis*, a person who is but little above a mere brute in legal rights, may act as the agent of his own or his hirer: *Powel* v. *the State*, 27 Ala. 51; *Stanley* v. *Nelson*, 28 Ala. 514. It was then, certainly not unlawful, or against the public policy of the nation, for Kent, Payne & Co. to keep their cotton, and keep it safely, during the late rebellion. It is the undoubted law of agency, that a person may do through another what he could do himself in reference to his own business and his own property; because the agent is but the principle acting in another name. The thing done by the agent is, in law, done by the principal. This is axiomatic and fundamental. It needs no authorities to support it. *Qui facit per alium, facit per se:* Broom's Max., marg.; 1 Pars. Con., 5th ed., p. 39, *et seq.*; Story's Agency, Par. 440. And to this may it be added, that an agent dealing with the property of his principal, must confine his acts to the limits of his powers; otherwise the principal will not be bound: 1 Pars. Con. 41, 42, 5th ed.; *Powell* v. *Henry*, 27 Ala. 612; *Botts* v. *McCoy et al.*, 20 Ala. 578; *Allen* v. *Ogden*, 1 W.C.C. 174. And it is the duty of

one dealing with an agent to know what his powers are and the extent of his authority: *Van Eppes* v. *Smith*, 21 Ala. 317; *Owings* v. *Hull*, 9 Pet. 608. Then the agency to receive the delivery of the cotton from Browder, in compliance with the order, was not illegal. If it went beyond that it was void. And those who dealt with Singleton were bound to know this as they were bound to know the law.

The judgment of the Court below is affirmed.

QUESTIONS

1. A, an infant, makes a contract for P, his principal, with T. P sues T on the contract. T contends that he is not bound because A is an infant. What decision?
2. T sues P on the contract. P contends that he is not bound because of the infancy of A. What decision?
3. A, an infant, agrees, for a consideration, to act as P's agent for six months. P sues A because A refuses to act. What decision?
4. A sues P because P revokes his authority before the expiration of the six months. What decision?
5. A makes a contract with T for his principal, P, who is an infant. P sues T on the contract. T contends that he is not liable because an infant cannot appoint an agent. What decision?
6. T sues P on the contract. P contends that he is not liable because he is an infant. What decision?
7. A, for a consideration, agrees to act as agent of P, an infant. P sues A because of his refusal to act. What decision?
8. A sues P because P prematurely revokes his authority to act. What decision?
9. What is the distinction between an agent and a servant? An agent and an independent contractor?
10. What is a *del credere* agency? a general agency? a universal agency? a special agency?
11. What is the relation of the law of principal and agent to the law of master and servant?
12. What is meant by the statement that the law of agency lies at the foundation of the law of business associations?

ATLEE *v.* FINK

75 Missouri Reports 100 (1881)

HENRY, J. Plaintiffs sued defendant for balance on account for lumber sold, $497.68. In his answer, defendant admits the purchase, but his defense is, that there is in the account an overcharge of $35, that he is entitled to a credit of $184.36 paid on the account

and that plaintiff owe him $261, as commission on lumber sold by plaintiffs to defendant's employers, on defendant's recommendation, for which he alleges plaintiffs agreed to pay him a commission of two and one-half per cent. All of these allegations were denied by plaintiff's replication. The defendant obtained a judgment for $38.73, from which plaintiffs appeal.

The evidence shows that plaintiffs resided at Fort Madison, Iowa, and were engaged in manufacturing and selling lumber; that they established a branch of their business at Kansas City, Missouri, and placed J. O'Sullivan in charge of it, to sell lumber. O'Sullivan testifies that he was employed by plaintiffs to sell their lumber. Samuel Atlee, one of plaintiffs, testifies that O'Sullivan was not authorized to make any agreement to pay commissions to other persons for selling their lumber. The firm paid O'Sullivan a salary of $1,900 per annum. The defendant, Fink, testifies that he, O'Sullivan, and W. H. Atlee (who was not a member of the firm of plaintiffs), were together when O'Sullivan and defendant made the agreement by which the latter was to receive the commission on sales O'Sullivan might make to defendant's employers through defendant's influence with them; that his employers paid him for superintending the erection of the various buildings erected by them, and it was his duty to keep the laborers at work, and see about materials and all details; that his employers would pay no bills for labor or lumber until certified by defendant to be correct; that he never informed them or any of them that he was to get a commission on the lumber purchased by them of plaintiffs. This is the substance of the testimony on the only branch of the case which we deem it necessary to consider.

O'Sullivan was not expressly, or by the nature of his employment, authorized to make the contract in question. He was, as he testified, but an agent to sell, and could not delegate that authority to another. Especially was he not authorized to promise a compensation for sales made for the firm by others, which would bind the firm. Story on Agency (6th ed.), sec. 387; *Warner* v. *Martin*, 11 How. (U.S.), 209.

But it is unnecessary to extend our remarks on that proposition, because if O'Sullivan had had ample authority to make such a contract, it is contrary to public policy to allow the plaintiffs to recover on it. Fink was employed by others to transact business for them, and they paid no bills for lumber not certified by him to be correct, and for two and one-half per cent commission on sales to his employes, he sold his influence with them to the plaintiffs. He kept them in

ignorance of the agreement he had made with O'Sullivan. That agreement was a temptation to him to certify as correct bills for lumber which might be incorrect, both as to the amount of lumber and the prices charged. His compensation could be increased by such conduct, and it is no answer that nothing of the kind occurred. In *Fuller* v. *Dame*, 18 Pick. (Mass.), 472, the court said: "The law avoids contracts and promises made with a view to place one under wrong influences; those which offer him a temptation to do that which may affect injuriously the right and interests of third persons." In *Spinks* v. *Davis*, 32 Miss. 152, the court said: "It is a sufficient objection to a contract on the ground of public policy, that it has a direct tendency to induce fraud and malpractice upon the rights of others, or the violation or neglect of high public duties." One employed by another to transact business for him has no right to enter into a contract with a third person, which would place it in his power to wrong his principal in the transaction of the business of the latter, and which would tempt a bad man to act in bad faith towards his employer. The interests of the defendant's employers and those of plaintiffs, as buyers and sellers, were antagonistic, and defendant could not serve two masters in a matter in which there was such a conflict in their interests. It makes no difference that the defendant was not employed to purchase the lumber for his employers. It is enough that it was his duty, under his employment, to examine and certify to the correctness of the lumber bills.

Under this view, it is wholly immaterial whether the agreement made by O'Sullivan with the defendant was ratified or not by the plaintiffs. The ratification of the contract would not have eliminated the element which rendered it invalid. The trial court entertained a different view of the subject, and embodied, in instructions given, that erroneous view, and refused instructions asked by plaintiffs which declared the law as herein announced, and its judgment is therefore reversed and the cause remanded.

Reversed and remanded.

QUESTIONS

1. What issue was under consideration in the principal case? How was the issue decided? What rule of law can be deduced from the decision?
2. Assume that O'Sullivan had had the authority to engage the defendant to sell lumber for the plaintiff, would the decision in this case have been the same?

3. "A person can do anything through an agent that he can do personally." Do you agree with this statement?
4. Can a person vote at a public election through an agent? Vote at a meeting of stockholders of a corporation? Make a will? Enter into a marriage contract? Take an oath?
5. P promises A $150 in consideration of the latter's promise to publish a criminal libel on T. A publishes the libel and brings an action for $150. What decision?
6. P directs A to sell certain personal property and promises him a commission for his services. A turns the property over to X who sells it on P's account. A sues P for his commission. What decision?

GRAVES *v.* HORTON

38 Minnesota Reports 66 (1887)

This was an appeal by the defendant from a judgment of the district court for Hennepin County where the action was tried before LOCHREN, J., and a jury, and plaintiff had a verdict. The defendant moved for a new trial on the ground that the verdict was not justified by the evidence and the motion was denied.

In addition to the facts recited in the opinion, it appeared from the testimony of the plaintiff that he purchased the property in question from the defendant, in Minneapolis, in January, 1886, receiving a bill of sale; that he did not think he could do anything with the property at the time, and did not go down to Spirit Lake, where the property was situated, till May, 1886, when he was handed a telegram by T. V. Horton, which had been received from Spirit Lake, and stated that McCurdy was tearing down the rink; that the telegram was a month old when handed to him, and that when he reached Spirit Lake he could not find the property, and found that the buildings, in which it was supposed to be, had been moved away. McCurdy testified that he purchased the property in question from the defendant through F. M. Horton, as her agent; that he took possession of it and disposed of it (refusing to state what disposition he made of it) and that, as a part of the consideration on his purchase, he conveyed 80 acres of land in Iowa, the conveyance being made to Caroline W. Horton (wife of F. M. Horton) under F. M. Horton's instructions.

MITCHELL, J. This action was brought to recover the value of certain property, which plaintiff had exchanged with defendant for a skating rink, skates, boats, etc., situated at Spirit Lake, Iowa. Plain-

tiff's claim is that there was an entire failure of title to this property, because defendant had previously sold it to one McCurdy. It is not claimed that defendant personally sold it to McCurdy, whatever was done in this regard having been done by one F. M. Horton, assuming to act as her agent. Hence, unless F. M. Horton had authority as defendant's agent to sell to McCurdy, there could have been no such sale, and plaintiff has no cause of action. The burden was on plaintiff to prove such agency.

It is axiomatic in the law of agency that no one can become the agent of another except by the will of the principal, either expressed or implied from certain circumstances; that an agent cannot create in himself an authority to do a particular act by its own performance, and that the authority of an agent cannot be proved by his own statement that he is such. Applying these elementary principles, and stripping the evidence of all that is immaterial and incompetent, and giving to what remains all the force that can be claimed for it, all that was brought home to defendant tending to prove any such agency is that, when F. M. Horton was in Spirit Lake, he transmitted and submitted to her in Minneapolis what purported to be a proposition from McCurdy to give for this property $1,090 in goods, and assume a mortgage on it for $385, and that she agreed to accept this proposition; that McCurdy being unable to carry this out, F. M. Horton submitted to her another proposition as coming from McCurdy, viz., to give in place of the goods 80 acres of land in Iowa; that defendant declined to accept this last proposition, and so notified McCurdy; that about two weeks after this she authorized F. M. Horton to negotiate the sale of this property to the plaintiff on the terms which were finally agreed upon, she herself making the transfer by executing the bill of sale described in the complaint. We have, on the other hand, the flat denials of both defendant and F. M. Horton that he ever had any authority from her to sell this property or ever was her agent for this or any other purpose.

This is really all the competent evidence there is bearing upon this question of agency. The acceptance of McCurdy's first proposition which he was unable to carry out, certainly does not tend to prove authority in F. M. Horton to sell on the terms of the second which defendant expressly declined to accept; and if any sale was ever made to McCurdy, it was on the basis of this last proposition. Hence the evidence of agency is reduced down to the fact that the defendant authorized F. M. Horton to negotiate the sale to plaintiff, which she

herself consummated by a bill of sale. It certainly cannot be that this is sufficient. It is true that agency may be proved from the habit and course of dealing between the parties; that is, if one has usually or frequently employed another to do certain acts for him, or has usually ratified such acts when done by him, such person becomes his implied agent to do such acts; as, for example, the case of a manager of a plantation in buying supplies for it, or the superintendent of a saw-mill in making contracts for putting in logs for the use of the mill, which are the cases cited by the respondent. It is also true as was said in *Wilcox* v. *Chicago, Mil. & St. Paul R. Co.*, 24 Minn. 269 (which involved the question of the authority of the person to whom goods were delivered to receive them), that a single act of an assumed agent, and a single recognition of it, may be of so unequivocal and of so positive and comprehensive a character as to place the authority of the agent to do similar acts for the principal beyond question. It is also true that the performance of subsequent as well as prior acts, authorized or ratified by the principal, may be evidence of agency, where the acts are of a similar kind, and related to a continuous series of acts embracing the time of the act in controversy, as indicating a general habit and course of dealing; as, for example, the acts of the president of a railway company in making drafts in the name of the company, which were honored by it, which was the case of *Olcott* v. *Tioga R. Co.*, 27 N.Y. 546, cited by counsel. But we think the books will be searched in vain for a case where it was ever held that authority to negotiate for the sale of property to one person at one time on certain terms, the transfer to be made by the principal in person, was evidence of authority to sell and transfer the same property at some former time to another person on different terms.

There are some facts about this case that would naturally incline the sympathies of the jury toward the plaintiff. He has so far got nothing for the property which he gave to defendant. The conduct of F. M. Horton was not calculated to commend itself to their favor as he admits obtaining and retaining a conveyance to his wife of the very land which McCurdy proposed to give to defendant in exchange for this property. But we do not see how, upon legal principles, the verdict can be sustained under the present state of evidence.

Judgment reversed and new trial ordered.

QUESTIONS

1. What was the issue under consideration in the principal case? How was it decided? What rule of law can be deduced from the decision?
2. The plaintiff in this case claimed that Horton as agent for the defendant had sold the property in question to McCurdy. What evidence did the plaintiff rely on to show that Horton had authority to sell to McCurdy?
3. What is meant by the statement that the burden was on the plaintiff to prove the existence of such an agency?
4. What is meant by the statement that no one can become the agent of another except by the will of such other person?
5. A, with P's knowledge and consent, for several months had been selling and delivering coal for P. On one occasion, A sold ten tons to T. P refused to deliver the coal because, as he contended, A had no authority to sell coal for him. T sues P for damages. What decision?
6. A, with P's knowledge and consent, sold and delivered a horse to X for P. Later, he sold and delivered another of P's horses to T. P sued T to recover possession of his horse, claiming that he had never given A authority to sell the horse in question. What decision?
7. T entered into a contract with P through A as agent. T sued P on the contract. T offered evidence that A had told him that he was an agent for P. Is this evidence admissible?
8. Is a consideration necessary for the existence of the relation of principal and agent? Is a consideration necessary for the existence of a contract of agency?
9. A gratuitously agrees to act as agent for P. P sues A for his refusal to act. What decision?
10. A sues P because P revoked his authority to act as agent. What decision?
11. A gratuitously agrees to act as agent for P. A, in pursuance of this authority, makes a contract for P with T. P sues T on the contract. T contends that he is not liable on the contract because there was no contract of agency between P and A. What decision?

JOHNSON *v.* DODGE

17 Illinois Reports 433 (1856)

This was a bill in equity for the specific performance of a contract for the sale of land. The bill was dismissed by WILSON, J., at the January term, Cook County Court of Common Pleas and thereupon the complainant brought this writ of error.

SKINNER, J. The bill and proofs show that one Iglehart, a general land agent, executed a contract in writing in the name of Dodge, the respondent, for the sale of certain land belonging to Dodge, to one Walters, and received a portion of the purchase money; that Walters afterward assigned the contract to Johnson, the complainant; a tender of performance on the part of Walters, and on the part of Johnson, and a refusal of Dodge to perform the contract. The answer of Dodge, not under oath, denies the contract, and sets up the statute of frauds as a defense to any contract to be proved. The evidence, to our minds, establishes a parol authority from Dodge to Iglehart to sell the land, substantially according to the terms of the writing. It is urged against the relief prayed, that Iglehart, upon a parol authority to sell, could not make for Dodge a binding contract of sale, under the statute of frauds; that the proofs do not show an authority to Iglehart to sign the name of Dodge to the contract, and therefore that the writing is not the contract of Dodge; that the writing not being signed by the vendee is void for want of mutuality; that no sufficient tender of performance on the part of complainant is proved, and that the proof shows that the authority conferred was not pursued by the agent. Equity will not decree specific performance of a contract founded in fraud, but where the contract is for the sale of land, and the proof shows a fair transaction, and the case alleged is clearly established, it will decree such performance.

In this case, the contract, if Iglehart had authority to make it, is the contract of Dodge and in writing; and it is the settled construction of the statute of frauds, that the authority to the agent need not be in writing; and by this construction we feel bound. 1 Parsons on Con. 42 and cases cited; *Doty* v. *Wilder*, 15 Ill. 407; 2 Parsons on Con. 292, 293, and cases cited; Saunders' Pl. and Ev. 541, 542, and 551; Story on Agency, 50; 2 Kent's Com. 614. Authority from Dodge to Iglehart to sell the land included the necessary and usual means to make a binding contract in the name of the principal. If the authority to sell may be created by parol, from this authority may be implied the power to use the ordinary and usual means of effecting a valid sale; and to make such sale it was necessary to make a writing evidencing the same. If a party is present at the execution of a contract or deed, to bind him as a party to it, when his signature is affixed by another, it is necessary that the person so signing for him should have direct authority to do the particular thing, and then the signing is deemed his personal act. Story on Agency, 51. In such case the party acts

without the intervention of an agent, and uses the third person only as an instrument to perform the mere act of signing. This is not such a case. The agent was authorized to negotiate and conclude the sale, and for that purpose authority was implied to do for his principal what would have been incumbent on the principal to do to accomplish the same thing in person. *Hawkins* v. *Chance*, 19 Pick. 502; 2 Parsons on Con. 291; Story on Agency, Chap. 6; *Hunt* v. *Gregg*, 8 Blackf. 105; *Lawrence* v. *Taylor*, 5 Hill, 107; 15 Ill. 411.

The mode here adopted was to sign the name of Dodge "by" Iglehart, "his agent," and it is the usual and proper mode in carrying out an authority to contract conferred on an agent. But if the signing the name of the principal was not authorized by the authority to sell, yet the signature of the agent is a sufficient signing under the statute. The language of the statute is, "signed by the party to be charged therewith, or some other person thereto by him lawfully authorized." If Iglehart had authority to sign Dodge's name, then the contract is to be treated as signed by Dodge; and if Iglehart had authority to sell, in any view his signature to the contract is a signing by "some other person thereto by him lawfully authorized," within the statute. *Truman* v. *Loder*, 11 Ad. and El. 589; 2 Parsons on Con. 291. It is true that authority to convey must be in writing and by deed; for land can only be conveyed by deed, and the power must be of as high dignity as the act to be performed under it. It was not necessary to the obligation of the contract that it should have been signed by the vendee. His acceptance and possession of the contract, and payment of money under it, are unequivocal evidences of his concurrence, and constitute him a party as fully and irrevocably as his signing the contract could. 2 Parsons on Con. 290; *McCrea* v. *Purmort*, 16 Wend. 160; *Shirly* v. *Shirly*, 7 Blackford, 452.

We cannot question the sufficiency of the tender in equity, to entitle the complainant to specific performance. *Webster et al.* v. *French et al.*, 11 Ill. 278. Nor do we find any substantial departure in the contract from the authority proved. While we hold that the authority to the agent who for his principal contracts for the sale of land, need not be in writing, yet we should feel bound to refuse a specific performance of a contract made with an agent upon parol authority, without full and satisfactory proof of the authority, or where it should seem at all doubtful whether the authority was not assumed and the transaction fraudulent.

Decree reversed and the cause remanded.

QUESTIONS

1. What is meant by the statement that this was a bill in equity for the specific performance of a contract for the sale of land?
2. On what defense did the defendant rely to defeat a recovery by the plaintiff? How did the court dispose of his contention?
3. What provisions are found in the Statute of Frauds relating to contracts for the sale of interests in land? What is the effect of noncompliance with the provisions of the statute on a contract for the sale of an interest in land?
4. P authorizes and directs A to sell two horses for him. A sells them to T. P refuses to deliver the horses. In an action by T against P for possession of the horses, T contends that the sale is invalid because A did not possess authority in writing to enter into the transaction. What decision?
5. A enters into a contract with T to sell land to the latter on behalf of P. T sues P on the contract. P defends on the ground that A's authority to act was not in writing. What decision?
6. A, in P's name, executes a deed to T, purporting to convey Blackacre to him. T sues P for the possession of the land. P contends that the deed is not legally binding because A did not possess proper authority to execute it. What decision?
7. P authorized A in writing to convey Blackacre. A executed a deed in P's name to T. T sued P for possession of the land. P contends that A did not have proper authority to execute the deed. What decision?
8. A, in the presence of P and at his direction, signed P's name to a deed, by which P conveyed Blackacre to T. T sued P for possession of the land. P contended that the deed was not legally binding, because A did not have proper authority to execute the instrument. What decision?
9. What is a power of attorney? What is its purpose? How is it drawn?
10. As a practical matter, would you say that the appointment of an agent and the delineation of his powers should always be in writing?
11. Draw up a written instrument by which you authorize A to act for you in the management of a branch of your business.

HEATH *v.* STODDARD

91 Maine Reports 499 (1898)

This was an action of replevin to recover a piano which one Spencer sold to the defendant for $125 in cash and a horse worth from $10 to $25. The jury returned a verdict for the plaintiff, and assessed damages in the sum of one cent. Defendant alleged exceptions.

WISWELL, J. Replevin for a piano. The piano was at one time the property of the plaintiff who intrusted it to one Spencer for the purpose of taking it to, and leaving it at, the house of the defendant, but without any authority, as the plaintiff claims and as has been found by the jury, to sell the piano or to make any contract for its sale; the arrangement being, as the plaintiff claims, that Spencer should merely take it to and leave it at the defendant's house and that a day or two later the plaintiff would go there and make a sale of it if he could.

Spencer had the piano taken to the defendant's house, but instead of simply leaving it so that the plaintiff might subsequently sell it, he assumed authority in himself to sell it to the defendant, who bought it and paid in cash and otherwise the full purchase price fixed by Spencer, without any knowledge of his want of authority.

Spencer was himself a dealer in pianos and musical instruments, and upon the very day when he made the arrangement with the plaintiff to take one of his (plaintiff's) pianos to the defendant's house, he had seen the defendant and attempted to sell him one of his pianos.

A principal is not only bound by the acts of his agent, whether general or special, within the authority which he has actually given him, but he is also bound by his agent's acts within the apparent authority which the principal himself knowingly permits his agent to assume, or which he holds the agent out to the public as possessing. Am. & Eng. Encycl. of Law, 2 Ed. Vol. I, page 969, and cases cited.

Whether or not a principal is bound by the acts of his agent, when dealing with a third person who does not know the extent of his authority, depends, not so much upon the actual authority given or intended to be given by the principal, as upon the question, what did such third person, dealing with the agent, believe and have a right to believe as to the agent's authority, from the acts of the principal. *Griggs* v. *Selden*, 58 Vt. 561; *Towle* v. *Leavitt*, 23 N.H. 360 (55 Am. Dec. 195); *Walsh* v. *Hartford Ins. Co.* 73 N.Y. 5.

For instance, if a person should send a commodity to a store or warehouse where it is the ordinary business to sell articles of the same nature, would not a jury be justified in coming to the conclusion that, at least, the owner had by his own act invested the person with whom the article was intrusted, with an apparent authority which would protect an innocent purchaser?

In *Pickering* v. *Busk*, 15 East, 43, quoted by MELLEN, C. J., in *Parsons* v. *Welbb*, 8 Maine, 38, Lord Ellenborough says: "Where the

commodity is sent in such a way, and to such a place as to exhibit an apparent purpose of sale, the principal will be bound and the purchaser safe."

Let us apply this principle to the present case. Spencer was a dealer in pianos. Immediately before this transaction he had been trying to sell a piano to the defendant. There was evidence tending to show that the plaintiff knew these facts. With this knowledge he intrusted the possession of this piano with Spencer for the purpose of its being taken by Spencer to the defendant's house with a view to its sale. Spencer was not acting merely as a bailee; he did not personally take the piano to the defendant's house, but had it done by a truckman or expressman; Spencer was employed for some other purpose. Whatever may have been the private arrangement between the plaintiff and Spencer, or the limit of authority given by the plaintiff, would not a jury have been warranted in coming to the conclusion that the purchaser was justified in believing, in view of all of these facts, that Spencer had authority to sell, and that the plaintiff knowingly placed Spencer in a position where he could assume this apparent authority to the injury of the defendant? We think that a jury might have properly come to such a conclusion, and that consequently the instructions were inadequate in this respect, that it was nowhere explained to the jury that a principal might be bound by the acts of an agent, not within his actual authority, but within the apparent authority which the principal had knowingly and by his own acts permitted the agent to assume.

Exceptions sustained.

QUESTIONS

1. What is the nature of the action of replevin? What must the plaintiff allege and prove to recover in this action?
2. What error did the lower court commit which caused the appellate court to sustain the exceptions of the defendant? How should the trial court have instructed the jury?
3. Did the plaintiff constitute Spencer an agent to sell the piano? If not, why should there be any doubt about his right to get back his property?
4. P left his automobile at A's garage to be repaired. A sold the machine to T. P sued T for possession of his property. What decision?
5. P stored his furniture with A. A sold "second hand furniture" in connection with his storage business. He sold P's furniture to T. P sued T for his furniture. What decision?

6. A states to T, in the hearing of P, that he has authority to sell grain for P. He has no such authority but P does not take the trouble to inform T that A is not his agent. Later, A enters into a contract with T for P. T sues P on the alleged contract. P contends that A had no authority to make the contract. What decision?
7. A advertises that he is agent of P. P sees the advertisement and writes to A, warning him to discontinue such advertisements. Notwithstanding the warning, A continues as before to hold himself out as P's agent. T enters into a contract with A in reliance on the impression that A is agent for P. T sues P on the alleged contract. P contends that A had no authority to make the contract. What decision?

GARVEY *v.* JARVIS

46 New York Reports 310 (1871)

Action to procure a decree to the effect that defendant held a judgment against plaintiff, assignee of the defendant, from one Malcolm, as agent or trustee of plaintiff and to enjoin its collection. The judgment was first assigned by Malcolm to one Roach and by him to Jarvis. Plaintiff appeals from a judgment for defendant.

CHURCH, C. J. The judge before whom this action was tried found, as facts, that one Malcolm held a judgment against the plaintiff for upward of $2,000, and had told the plaintiff he would discharge it for $500, but the plaintiff had not accepted the offer; that the defendant (who was a stranger to the plaintiff), having learned of the willingness of Malcolm to discharge the judgment for that sum, applied to him, and by the false representation that he came from and was a friend of the plaintiff, induced Malcolm to assign the judgment to him, for which he paid $500, and the plaintiff now claims the benefit of this purchase.

It is claimed, however, that upon the principles applicable to principal and agent, or trustee and *cestui que trust*, the plaintiff is entitled to maintain the action; that Roach, having assumed to act as the agent of the plaintiff, the latter could ratify the act and entitle himself to the benefits of it; and the defendant holds the judgment as trustee for the plaintiff, and must account to him for it. It is a familiar rule that a subsequent ratification of an unauthorized act of an agent is equal to an original authority. (Dunlap's Paley's Agency, 171, note *a*.) But in this case the essential element is wanting, that the act must be done for another. Here it was not so done. The most that can be claimed is, that the defendant said he was acting

for the plaintiff, which was false. He paid his own money, and in fact, acted for himself. He was a stranger to the plaintiff, and of course, under no obligation to act for him, and as we have seen he deprived the plaintiff of nothing to which he was entitled. The cases on this subject have generally arisen between the principle and the person with whom the agent acted, either to enable the former to derive some advantage, from or to enforce some liability against, him; but in all these cases the agent acted for the principal, and the act was assumed by him with the assent of the agent. It has been held that where A does an act as an agent for B, without any communication with C, the latter cannot afterward, by adopting it, make A his agent, and therefore to incur any liability or take any benefit under the act of A. *Wilson* v. *Tunman*, 6 Mann. & Grang. 236.

No authority has been cited, and I think it is safe to say that none exists, in which any court has ever held that a false declaration of agency for another enables the latter, as against the alleged agent, to receive the benefit of an act actually performed for the latter, unless that act was performed under such circumstances as to create an estoppel, or unless the assumed principal has been deprived of some legal right, or otherwise injured.

There is no estoppel in this case. The plaintiff neither did anything, nor omitted to do anything in consequence of the statement of the defendant, and he was deprived of no legal right.

RAPALLO, J. Read a dissenting opinion, maintaining that the assignment of the judgment, having been intended by Malcolm for the benefit of Garvey, and Roach, with knowledge of this, having procured it to be made to himself, by representation to Malcolm that he, Roach, came from Garvey, and was acting for his benefit, and the assignment having been thus delivered to and received by Roach, in the assumed character of Garvey's representative, Roach in fact received it as trustee for Garvey. That Garvey had the right to affirm this trust, and claim the benefit of it, though created without his previous authority, knowledge or privity.

Judgment affirmed.

QUESTIONS

1. What kind of relief did the plaintiff ask for in the principal case? On what theory did he ask for this form of relief? Did the court grant the relief asked for? Why or why not?
2. Why did Justice Rapallo dissent from the majority view? With which do you agree, the majority or minority view?

3. A, without authority, but intending to act for P, contracted to buy for P 100 shares of stock in a certain corporation from T. T delivered the stock to A who turned it over to P. What are T's rights against P?
4. A, intending to act for himself but professing to act for P, buys grain from T, which T delivers to A. When P learns of the transaction, he notifies A and T that he ratifies the unauthorized act. P brings an action against A for possession of the grain. What decision?
5. In the foregoing case, T brings an action against P for the price of the grain. P contends that he is not liable because A purchased the grain on his own account. What decision?
6. What is the justification for holding, as the principal case does, that a principal cannot ratify an unauthorized act unless the agent intended it for him as principal?
7. Is there any business justification for the doctrine of ratification?

KEIGHLEY, MAXSTED & CO. *v.* DURANT

Law Reports, 1901, Appeal Cases 240 (1901)

Roberts, a corn merchant at Wakefield, was authorized by Keighley, Maxsted & Co., the appellants, to buy wheat on a joint account for himself and them at a certain price. Roberts having failed to buy at the authorized price, on May 11, 1898, without authority from the appellants, made a contract by telegram with the respondent Durant, a corn merchant in London, to buy from him wheat at a higher price. Roberts made the contract in his own name but, as he afterwards said at the trial, intending it to be on a joint account for the appellants, Keighley, Maxsted & Co., and himself. That intention was not disclosed by Roberts to Durant. The next day the appellants, by their manager Wright, agreed with Roberts to take the wheat on a joint account with him. Roberts and the appellants having failed to take delivery of the wheat, Durant resold it at a loss and sued them for the amount in an action tried before Day, J., and special jury. At the close of the plaintiff's case, the jury having been discharged, Day, J., dismissed the action against the appellants on the grounds that there was no ratification in law of the contract, and gave judgment against Roberts for the amount claimed. The Court of Appeal (Collins and Romer, L.JJ., A. L. Smith (M. R., then L. J., dissenting) reversed the decision as regards the appellants, and ordered a new trial on the ground that there was evidence for the jury that Roberts contracted on behalf of himself and the appellants.

LORD BRAMPTON: My Lords, it was not suggested in any of the several telegrams in which the contract was contained, or in any other way, that Durant was made aware, or that Roberts ever hinted to him, that in making it he was acting by the authority, or even on behalf of an undisclosed principle. Had he so made it—though at that time no authority from Keighleys was then in existence—Keighleys might have ratified and adopted it, and having done so both they and Durant would have been as responsible upon it, each to the other as if Keighleys had been a party to it from the beginning; but as this contract was clearly not so made, but was a simple written contract between Durant, the vendor, and Roberts, acting apparently for himself only, as vendee, it could not be so ratified by Keighleys, for there was no contract open for them to ratify; and it could not have been adopted by them; for after a contract has been finally concluded between two persons it cannot be altered so as to make a third person liable upon it. If this is desired it must be done through the medium of a new contract.

But it is said for the plaintiff that when Roberts made his contract he had within his mind an intention, though he never communicated or disclosed it to anybody, to make it on the joint account of Keighleys and himself, and that such secret intention was quite sufficient to empower Keighleys to ratify and adopt it. I cannot assent to this view. I have always been under the impression that a concurrence in intention was an essential element of a contract. Nobody can doubt that it is essential in making an agreement to ascertain who are those intended to be made parties to it. It is impossible in construing a contract to give any weight to such a reserved intention as that suggested in this case; to do so would be to open a wide doorway to fraud and deception; and it would necessitate the addition of the doubtful science of thought-reading to the requirements of a mercantile education. I reject, therefore, this doctrine of mental reservation, and strip from the case the element of secret intention.

The case then is reduced to this: that there is a contract between Roberts and Durant simply, to which it was never avowedly contemplated that Keighleys should be party. Neither Keighleys nor Durant could make the former liable by adoption or ratification of a contract to which, when it was concluded, it was not in contemplation of themselves or Durant that they should be so. This action, therefore, which is based on a contract to which Keighleys were not parties, must fail.

I say nothing about any new contract which was open for the parties, or any of them to make if they had so thought fit—a new contract between themselves. It may or may not be that some contract between Roberts and Keighleys might have been formulated out of the interview with Wright on May 12 at Manchester. I am now dealing only with the contract made on the 11th between Roberts and Durant, to which in my opinion the appellants (Keighleys) could not make themselves, or be made by Durant, parties.

I will not detain your Lordships by again referring to the numerous cases recited at the bar, nor to those so fully discussed by the Court of Appeal, in addition to these I desire only to refer to that of *Kelner* v. *Baxter*, decided by Erle, C. J., and Willes, Byles, and Keating, JJ. I agree in the judgment of the present Master of the Rolls in the Court of Appeals. It follows that, with all respect to the opinions expressed by the majority of that Court, I cannot concur in their views. In my opinion, therefore, the judgment of the Court of Appeal should be reversed, the judgment of Day, J. restored, and this appeal allowed with costs.

Order appealed from reversed and judgment of Day, J., restored, with costs here and below.

QUESTIONS

1. What was the issue involved in the principal case? How was it decided? What rule of law can be deduced from this decision?
2. Why is it necessary for a person to profess to act for a principal as a condition of ratification by the latter?
3. Does the court in this decision say that the agent must not only profess to act for a principal but also state who the principal is?
4. A, with authority from P, contracts to buy grain from T, without disclosing the fact to T that he is acting for P. What are P's rights under this contract?

WORKMAN *v.* WRIGHT

33 Ohio State Reports 405 (1878)

WRIGHT, J. Under the pleadings and findings of the court below, it may be assumed that the name of Calvin Wright was a forgery, as there was evidence tending to show the fact, and we cannot say that the conclusion reached, in this respect, was clearly against the testimony. It is claimed, however, that his admissions and promises to pay the note, ratified the unauthorized signatures.

Had Workman, the owner of the note, taken it upon the faith of these admissions, or had he at all changed his status by reason thereof, such facts would create an estoppel, which would preclude Wright now from his defense. This appears from most of the authorities cited in the case. But no foundation for an estoppel exists. All these statements of Wright, whatever they were, were made after Workman became the owner of the paper. Workman did not act upon them at all, he was, in no way, prejudiced by them, nor did they induce him to do, or omit to do, anything whatever to his disadvantage. But it is maintained, that without regard to the principle of estoppel, these admissions and promises are a ratification of the previous, unauthorized act, upon the well-known maxim, *Omnis ratihabitio retrotrahitur et mandato priori aequiparetur.*

It is said that a distinction exists between the classes of cases to which this principle applies. Where the original act was one merely avoidable in its nature, the principle may ratify the action of his agent, although it was unauthorized. But where the act was void, as in case of a forgery, it is said no ratification can be made, independent of the principle of estoppel, to which we have alluded. Most of the authorities, cited by counsel for plaintiff in error, are of the first class where the act was only voidable. *Bank* v. *Warren*, 15 N.Y. 577, was where one partner, without authority, and for his own exclusive benefit, indorsed his own note in the firm name; his co-partner was held bound by a subsequent promise to pay it without any independent consideration.

In *Crout* v. *DeWolf*, 1 R.I. 393, the third clause of the head note is: "Where the person whose signature is forged promises the forger to pay the note, this amounts to ratification of the signature, and binds him." But an examination of the case shows that the plaintiff had bought the paper in consequence of what the defendant said to him, and the court charged that if, before purchasing the note, plaintiff had asked defendant if he should buy, and he was told he might, defendant could not excuse himself on the ground of forgery. So that the case may be put on the ground of estoppel, without replying upon the ground stated in the head note quoted.

Harper v. *Devene*, 10 La. An. 724, was where a clerk of a house signed the name of the house by himself as an agent. Defendant, a member of the house, afterward took the note, corrected its date, and promised to pay it; and this was held a ratification to make him liable. In this case, and many like it, it may be remarked

that the agent assumed to have authority, and does the act under that belief; but in case of forgery there is no such authority and no such belief.

Upon the other hand there are authorities holding that a forgery cannot be ratified. There is a fully considered case in the English Exchequer: *Book* v. *Hook*, 3 Albany Law Journal 255; 24 Law Times 34. This was a case where defendant's name was forged, and he had given a written memorandum that he would be responsible for the bill. Chief Baron KELLY places his opinion upon the grounds: 1. That defendant's agreement to treat note as his own was in consideration that plaintiff would not prosecute the forger. 2. That there was no ratification as to the act done—the signature to the note was illegal and void. And though a voidable act may be ratified, it is otherwise when the act is originally, and in its inception, void. The opinion fully recognizes the proposition, that where acts or admissions alter the conditions of the holder of the paper the party is estopped, but it is necessary that such a case should be made.

It is further held that cases of ratification are those where the act was pretended to have been done for or under the authority of, the party sought to be charged, which cannot be in case of forgery. A distinction is also made between civil acts, which may be made good by subsequent recognition, and a criminal offense which is not capable of ratification. Baron MARTIN did not concur. In *Woodruff and Robinson* v. *Monroe*, 33 Md. 147, this is held: "If, in an action against an indorser of a promissory note by the bona fide holders thereof, it is shown that the indorsement was not genuine and the defendant did not ratify or sanction it prior to the maturity of the note and its transfer to the plaintiff, he is not liable. But if he adopted the note prior to its maturity, and by such adoption assisted in its negotiation, he would be estopped from setting up the forgery in a suit by a bona fide holder. But any admission by the defendant, made subsequently to the maturity of the note would not be evidence that he had authorized the indorsement of his name thereon."

In *McHugh* v. *County of Schuylkill*, 67 Pa. St. 391, the defense to a bond was a forgery. The court below charged that if the obligor subsequently approved and acquiesced in the forgery or ratified it, the bond was binding on him. It was held that, there being no new consideration, the instruction was error; also, that a contract infected with fraud was void, not merely voidable, and confirmation without any new consideration was *nudum pactum*.

Upon principle we cannot see how a mere promise to pay a forged note can lay a foundation for liability of the maker so promising, when the promise was made under the circumstances set forth in the record. In addition to the fact that there are no circumstances to create an estoppel, there was no consideration for the promise. Wright received nothing and it is a simple *nudum pactum*. The consideration for a promise may be either an advantage to the promisor or a detriment to the promisee, but here neither exists. Wright had signed a note, and when the one in suit was shown to him, said he would pay it, supposing it to be the one he signed. He was an ignorant man who could not read writing, though he could sign his name, and being unable to read the body of the instrument said it was all right, and he would pay it. But the promise was without that consideration which would make it a binding contract.

Judgment affirmed.

QUESTIONS

1. What issue was under consideration in the principal case? How was the issue decided? What rule of law can be deduced from this decision?
2. What reasons were given by the court for its decision? Do these reasons seem to you satisfactory?
3. The court emphasized the fact that there was no consideration for the promise to pay the note. Do you understand that a consideration is a necessary element of a ratification?
4. The court said that a forgery is void. Presumably the court meant by this statement that the note as it stood had no legal consequences. Does any unauthorized act of an agent have any legal consequences until the principal has in some way ratified it?
5. What is the essence of the offense of forgery? Does the forger intend to act for the person whose name he signs? Does he profess to act for that person?
6. In this case, does it appear that the defendant knew that his signature was forged when he made the promise to pay the note? What practical difference does it make whether he knew or did not know that his signature was a forgery?
7. T buys a note signed by P in reliance on P's statement that his signature is genuine. T sues P on the note. P proves that his signature is forgery and that he was unaware of it when he told T that it was genuine. What decision?
8. X buys P's note in reliance on a statement of P that the signature is genuine. X transfers it to T, stating to T that P had admitted the genuineness of his signature. T sues P on the note. P proves that his signature is a forgery and that he was unaware of the fact when he admitted its genuineness. What decision?
9. Even assuming that a forgery can be ratified, would that affect the power of the state to punish the forger for his offense?

WHEELER & WILSON MANUFACTURING CO. *v.* AUGHEY

144 Pennsylvania Reports 398 (1891)

Action on four notes signed by defendant, who alleged that he was induced to sign them by false representations made to him by one Landis, agent for the plaintiff company. Landis falsely represented that he was not indebted to said company, that the notes were desired by it as collateral security for certain sewing-machines to be furnished by it to Landis, who was defendant's nephew. The machines were not furnished, and the notes were used by the company to secure a prior indebtedness of Landis for machines previously furnished him by said company. Judgment for defendant, and plaintiff appealed.

GREEN, J. The learned court below distinctly charged the jury that if the notes in suit were given for a past indebtness of Landis to the plaintiff, their verdict should be in favor of the plaintiff; but if they found that they were given for machines to be furnished thereafter, and the machines were not delivered, the verdict should be for the defendant. The jury found for the defendant, and thereby determined that the notes were given for machines to be furnished in the future. There was abundant testimony in support of the defendant's contention, and we must therefore regard it as an established fact that the notes were given in consideration that machines should be delivered to Landis by the plaintiff subsequently to the execution and delivery of the notes in question. It is beyond all question that Landis obtained the signature of the defendant to the notes, and that he delivered the notes so signed to the plaintiff, who received and kept them, and affirmed their title to them by bringing suit upon them against the defendant.

For the purpose of obtaining the notes, Landis most certainly acted as the representative of the plaintiff, and they conclusively accepted the fruits of his act. That they cannot do this without being subject to the conditions upon which he obtained the notes, whether he had authority or not to make or agree to those conditions, is too well settled to admit of any doubt.

The whole doctrine was well expressed by SHARSWOOD, J., in the case of *Mundorff* v. *Wickersham*, 63 Pa. St. 87, 3 Am. Rep. 531: "If an agent obtains possession of the property of another, by making a stipulation or condition which he was not authorized to make, the principal must either return the property, or if he receives it, it must

be subject to the condition upon which it was parted with by the former owner. This proposition is founded upon the principle which pervades the law in all its branches: *Qui sentit commodum sentire debet et onus*. The books are full of striking illustrations of it, and more especially in cases growing out of the relation of principal and agent. Thus where a party adopts a contract which was entered into without his authority, he must adopt it altogether. He cannot ratify that part which is beneficial to himself and reject the remainder; he must take the benefit to be derived from the transaction *cum onere*."

This doctrine is so reasonable and so entirely just and right in every aspect in which it may be considered, and it has been enforced by the courts with such frequency and in such a great variety of circumstances, that its legal soundness cannot for a moment be called in question.

It is of no avail to raise or discuss the question of the means of proof of the agent's authority. The very essence of the rule is, that the agent had no authority to make the representation, condition, or stipulation, by means of which he obtained the property, or right of action, of which the principal seeks to avail himself. It is not because he had specific authority to bind his principal for the purpose in question that the principal is bound, but notwithstanding the fact that he had no such authority. It is the enjoyment of the fruits of the agent's action which charges the principal with responsibility for his act.

It is useless, therefore, to inquire whether there is the same degree of technical proof of the authority of the agent, in the matter under consideration, as is required in ordinary cases where an affirmative liability is set up against a principal by the act of one who assumes to be his agent. There the question is as to the power of the assumed agent to impose a legal liability upon another person; and in all that class of cases, it is entirely proper to hold that the mere declarations of the agent are not sufficient. But in this class of cases the question is entirely different. Here the basis of liability for the act or declaration of the agent is the fact that the principal has accepted the benefits of the agent's act or declaration. Where that basis is made to appear by testimony, the legal consequence is established. Justice SHARSWOOD, in the case above cited, after enumerating many instances in which the doctrine was enforced, sums up the subject thus: "Many of these cases are put upon an implied

authority, but the more reasonable ground as it seems to me, is that the party having enjoyed a benefit must take it *cum onere.*"

We are of opinion that the learned court below was entirely right in the treatment of this case.

Judgment affirmed in each of these cases.

QUESTIONS

1. What authority did Landis, the agent, possess? Did he have any authority from the plaintiff to make false representations as to the state of accounts between himself and his principal? If not, why is the plaintiff not entitled to recover on the notes?
2. A, without authority, sold and delivered coal to T for P. T paid A for the coal and A accounted to P for the money. T sues P for damages, showing that A, while delivering the coal, negligently broke several windows in his house. P contends that he is not liable because he neither authorized nor ratified the commission of a tort by A. What decision?
3. A makes a contract with T for a corporation which has not yet been organized. When the corporation comes into existence, it votes to ratify the contract. T later sues the corporation on this contract. The corporation contends that it is not liable on the contract because it was not in existence at the time the contract was made. What decision?
4. A, professing and intending to act for P, contracts to sell P's horse to T. Before P learns of the contract, the horse is attached by P's creditors. P then states to T that he ratifies the contract. T sues the creditors for conversion of the horse. What decision?
5. A, without authority, insures P's house. The house burns. Thereupon P notifies the insurance company that he ratifies the act of A in insuring the house. What decision in an action by P against the insurance company on the policy?

DODGE *v.* HOPKINS

14 Wisconsin Reports 630 (1861)

This was an action to recover instalments due upon a written contract under seal by which Dodge had agreed to sell Hopkins certain lands which the latter agreed to buy and pay for in given instalments, one of which was paid to the agent at the date of contract. The contract was executed on the part of Dodge by an agent who assumed to act under a letter of authority from Dodge and his wife which had been executed in Spain. It was objected on the trial that

the power of attorney was not executed so as to authorize the act of the agent. There is no evidence that the defendant had at any previous time sought to repudiate the contract on this ground, but he sought to file a supplemental answer showing that since the commencement of the suit he had tendered the money to an alleged agent of plaintiff and demanded the deed agreed upon. The supplementary answer was rejected. Judgment for plaintiff and defendant appealed.

DIXON, C. J. (After deciding that the supplemental answer was properly rejected because it did not appear that the agents had the authority to accept the money or make the conveyance, and that the power of attorney was not sufficient to authorize the agent to execute the contract on the part of the plaintiff because as the power from Dodge and his wife was joint, it did not authorize a sale of the property of Dodge alone.) We are next to ascertain the effect of this lack of authority upon the rights of the defendant. It is very clear in the present condition of the case, that the plaintiff was not bound by the contract, and that he was at liberty to repudiate it at any time before it had actually received his sanction. Was the defendant bound? And if he was not, could the plaintiff, by his sole act of ratification, make the contract obligatory upon him? We answer both questions in the negative. The covenants were mutual—those of the defendant for the payment the money being in consideration of that of the plaintiff for the conveyance of the lands. The intention of the parties was that they should be mutually bound—that each should execute the instrument so that the other could set it up as a binding contract against him, at law as well as in equity, from the moment of its execution.

In such cases it is well settled, both on principle and authority, that if either party neglects or refuses to bind himself, the instrument is void for want of mutuality, and the party who is not bound cannot avail himself of it as obligatory upon the other. *Townsend* v. *Corning*, 23 Wend. (N.Y.) 435, and *Townsend* v. *Hubbard*, 4 Hill (N.Y.) 351, and cases there cited. The same authorities also show that where the instrument is thus void in its inception no subsequent act of the party who has neglected to execute it, can render it obligatory upon the party who did execute it, without his assent. The opinion of Judge BRONSON in the first named case is a conclusive answer to all arguments to be drawn from the subsequent ratification of the party who was not originally bound. In that case, as in this, the vendors had

failed to bind themselves by the agreement. He says: "It would seem most extraordinary if the vendors could wait and speculate upon the market, and then abandon or set up the contract as their own interest might dictate. But without reference to prices and whether the delay was long or short, if this was not the deed of the vendee at the time it was signed by himself and Baldwin (the agent), it is impossible that the vendors, by any subsequent deed of their own without his assent, could make it his deed. There is, I think, no principle in the law which will sanction such a doctrine." The only point in which the facts in that case differ materially from those here presented, is that no part of the purchase money was advanced to the agent. But that circumstance cannot vary the application of the principle. The payment of the money to the agent did not affect the validity of the contract, or make it binding upon the plaintiff. He was at liberty to reject the money, and his acceptance of it was an act of ratification with which the defendant was in no way connected, and which, although it might bind him, imposed no obligation upon the defendant until he actually assented to it. It required the assent of both parties to give the contract any vitality or force.

I am well aware that there are dicta and observations to be found in the books, which, if taken literally, would overthrow the doctrine of the cases to which I have referred. It is said in *Lawrence* v. *Taylor*, 5 Hill (N.Y.) 113, that "such adoptive authority relates back to the time of the transaction, and is deemed in the law the same to all purposes as if it had been given before." And in *Newton* v. *Bronson*, 3 Kern. (N.Y.) 594 (67 Am. Dec. 87), the court says: "That a subsequent ratification is equally effectual as an original authority, is well settled." Such expressions are, no doubt, of frequent occurrence, and although they display too much carelessness in the use of language, yet if they are understood as applicable only to the cases in which they occur, they may be considered as a correct statement of the law. The inaccuracy consists in not properly distinguishing between those cases where the subsequent act of ratification is put forth as the foundation of a right in favor of the party who has ratified, and those where it made the basis of a demand against him. There is a broad and manifest difference between a case in which the party seeks to avail himself, by subsequent assent, of the unauthorized act of his own agent, in order to enforce a claim against a third person, and the case of a party acquiring an inchoate right against a principal by an unauthorized act of his agent, to which validity

is afterwards given by the assent or recognition of the principal. Paley on Agency, 192, note. The principal in such a case may, by his subsequent assent, bind himself, but, if the contract be executory, he cannot bind the other party. The latter may, if he choose, avail himself of such assent against the principal, which, if he does, the contract, by virtue of such mutual ratification, becomes mutually obligatory. There are many cases where the acts of the parties, though unavailable for their own benefit, may be used against them. It is upon this obvious distinction, I apprehend, that the decisions I have cited are to be sustained. *Lawrence* v. *Taylor* and *Newton* v. *Bronson* were both actions in which the adverse party claimed rights through the agency of individuals whose acts had been subsequently ratified. And the authorities cited in support of the proposition laid down in the last case (*Weed* v. *Carpenter*, 4 Wend. (N.Y.) 552; *Moss* v. *Rossie Lead Mining Company*, 5 id. 137) will when examined be found to be cases where the subsequent assent was employed against the person who had given it, and taken the benefit of the contract.

Reversed.

QUESTIONS

1. What was the issue under consideration in the principal case? How was the issue decided? What rule of law can be deduced from the decision?
2. If this decision is to be taken as law, what is left of the doctrine of ratification?
3. One writer, commenting on the decision in *Dodge* v. *Hopkins*, says: "This is obviously too refined for the necessities of business." Why?
4. A makes an unauthorized contract for P with T. Before P learns of the transaction, A and T agree to rescind the contract. P sues T on the alleged contract. What decision?
5. A makes an unauthorized contract for P with T. T, as soon as he discovers that A had no authority to act for P and before P ratifies, notifies P that he does not intend to be bound by the agreement. P sues T on the alleged contract. What decision?
6. A makes an unauthorized contract for P with T. P, as soon as he learns of the transaction, ratifies it. T then notifies P that he does not intend to be bound by the agreement because A had no authority originally to make it. P sues T on the alleged contract. What decision?

HALL *v.* HARPER

17 Illinois Reports 82 (1855)

CATON, J. This was an action of replevin for a horse. The bill of exceptions shows that in the spring of 1852, a son of the plaintiff, about 18 years of age, and who resided with him, exchanged the horse in question, which belonged to the plaintiff, with the defendant for another horse.

A few days before the exchange the plaintiff forbade his son to exchange the horse. After the exchange the son took the horse home to the plaintiff. The agreement to exchange was made on Saturday and the exchange was made several days later. The son told his father, on the Saturday, of the agreement which he had made to exchange, and it does not appear that the plaintiff expressly approved of or forbade the exchange. The witness does not seem to remember what his father said about it, only he says he knows his father did not tell him to make the exchange. Nor does it appear from the son's testimony that the father made any objection when he brought the horse home which he had got from the defendant. The plaintiff was afterward seen riding the horse. A few days after the exchange the plaintiff told the witness, Snyder, that if the horse which his son had swapped with the defendant for, "lived and looked well, he would make a horse that would sell for more than the one his son had swapped to the defendant." The parties lived about two miles apart, and met several times; and on one occasion the defendant rode the horse, in controversy, to the plaintiff's house, but nothing was said between them about the exchange of horses which had been made. Two or three weeks after the exchange had been made, the plaintiff was taken sick and remained ill until about the time this suit was commenced. After the exchange the son took the horse home to his father's where he remained two or three months; at the expiration of which time, the plaintiff took the horse back to the defendant and offered to return him, and demanded of the defendant the horse which the son had let him have. The defendant refused to return him whereupon this suit was brought.

From this evidence the jury was well warranted in finding that the plaintiff had acquiesced in and approved of the exchange of horses which had been made by his son, and thus adopted that act as his own. He did not repudiate the bargain which his son had made for the exchange when he was advised of it before the exchange was

actually made, but passively allowed the executory bargain to be executed; and when his son brought the horse home he made no objections to the exchange, but retained and used the horse obtained of the defendant. He still forbore to remonstrate when he met the defendant several times subsequently, and even when the defendant rode the horse which he had obtained of his son, to the defendant's house. It is plainly inferable from the evidence that he retained and treated the horse as his own for about three months without a word of dissatisfaction or disapproval. An old and just legal maxim may here be applied to the plaintiff, which says, "If he keeps silent when duty requires him to speak, he shall not be allowed to speak when duty requires him to keep silent." His continued silence and long apparent acquiescence in the act of his son well justified the defendant in supposing that it met with his entire approval. He cannot be allowed to lie by and speculate on the chances of a good or bad bargain, or upon the chances of the horse, procured of the defendant, turning out good or bad; or, to use his own expression "looking well." If he intended to repudiate the action of his son, he should have done so promptly, so that the defendant might know what he had to rely upon.

We think a different verdict would not have been justified by the evidence, and the judgment must be affirmed.

Judgment affirmed.

QUESTIONS

1. Precisely what is decided by the principal case?
2. Does the principal case decide that mere acquiescence on the part of the principal is sufficient evidence from which the jury may infer a ratification?
3. A makes an unauthorized contract with T for P. When P learns of it, he tells A that he ratifies it. T sues P on the contract. What decision?
4. P tells A that he is glad that the contract was made. T sues P on the contract. What decision?
5. A without authority buys grain from T for P. P, with full knowledge of all the facts, pays a part of the purchase price of the grain. T brings this action for the balance. What decision?
6. A without authority sold property belonging to P, received the purchase price and misappropriated it. When P learned what A had done, he forced A to give him a chattel mortgage to secure the payment of the money misappropriated. P brought this action against T to recover possession of the property which A sold without authority. T contended that P had ratified the sale. What decision?

7. A sells P's horse without authority and accounts to P for the purchase price. P, not knowing where the money came from, deposits it to his credit in the bank. When he discovers its source, he tenders it to T and demands possession of his horse. T refuses to return the animal. P sues him in trover for conversion of the horse. What decision?
8. A without authority sold P's automobile to T. P brought an action against T for the purchase price. Later, P dismissed the action and demanded the return of his machine. T refused to return it. P brought an action of trover for its conversion. What decision?
9. A, cashier of the P Bank, without authority, but purporting and professing to act for his bank, permitted the D Bank to use P's funds in satisfaction of A's personal obligations. At the time the unauthorized transactions were discovered, A was hopelessly insolvent. The P Bank did nothing about the matter for some six or seven months, when it brought an action against the D Bank for the money which it had used in satisfying A's personal obligations. What decision?

3. Operation of the Relation of Principal and Agent

a) As between Principal and Agent

RICE *v.* WOOD

113 Massachusetts Reports 133 (1873)

Action in contract to recover commission as a broker. Defendant requested the court to charge that a broker acting for both parties cannot recover commission from either, unless both knew of and assented to this double agency. The court, however, charged that he could recover from the party who had knowledge of it. Plaintiffs recovered and defendant alleged exceptions.

DEVENS, J. In this case there was evidence at the trial in the court below that the plaintiffs had been employed by a third person, who promised to pay them a commission therefor, to dispose of certain real estate, and that afterwards, without the knowledge of such person, an agreement was made between the plaintiffs and defendant, by which the plaintiffs were employed to act for the defendant on the exchange of certain stocks held by him for real estate, and were promised a commission if such exchange should be effected, the defendant knowing at the same time that the plaintiffs were employed for a commission to sell such real estate; and further that afterward the plaintiffs introduced the defendant to the owner of such real estate and by the instrumentality of the plaintiffs the exchange of defendant's stock for such real estate was effected.

If this were an action by the plaintiffs against the owner of the real estate, for commissions earned in disposing thereof, the decision of this court in *Farnsworth* v. *Hemmer*, 1 Allen 494 would be conclusive against the claim on the ground that the plaintiffs, if such facts be proved, had entered into a relation inconsistent with the confidence reposed in them by such owner, and placed themselves in a position antagonistic to his interests. This case presents, however, the question whether, conceding that the plaintiffs could not recover their commissions from the owner of the real estate, they may not recover those they claim to be entitled to from the defendant, as he knew fully, at the time of his entering into the contract, the relation in which the plaintiffs stood to the third party. It was the duty of the plaintiffs to get the highest price for the real estate that could be obtained in the market; while the contract between the plaintiffs and the defendant was an inducement to the plaintiffs to effect a sale to the defendant, even if it was on lower terms than might have been obtained from others, because they thereby secured their commission from both parties. It was therefore an agreement which placed the defendant under the temptation to deal unjustly with the owner of the real estate. *Walker* v. *Osgood*, 98 Mass. 348. Contracts which are opposed to open, upright, and fair dealing are opposed to public policy. A contract by which one is placed under a direct inducement to violate the confidence reposed in him by another is of this character. If the plaintiffs were guilty of injustice to the owner of the real estate, by placing themselves under an inducement to part with it at less than its full market value, they should not be allowed to collect the promised commission on the sale of the stock, which was the consideration for which they put themselves in such a position. No one can be permitted to found rights upon his own wrongs or even against another also in the wrong. A promise made to one in consideration of doing an unlawful act, as to commit an assault or practice fraud on a third person, is void in law; and the law will not only avoid contracts the avowed purpose or expressed object of which is to do an unlawful act, but those made with a view to place, or the necessary effect of which is to place, a person under wrong influences, and offer him a temptation which may injuriously affect the rights of third persons.

Nor is it necessary to show that injury to third persons has actually resulted from such a contract, for in many cases where it had occurred this would be impossible to be proved. The contract is

avoided on account of its necessarily injurious tendency. *Fuller* v. *Dame*, 18 Pick. (Mass.) 472. We are of opinion, therefore, that the judge who presided at the trial erred in the instruction given, and that the defendant was entitled to an instruction substantially like that asked for. Nor can the ruling be sustained upon the ground suggested at the bar, that the plaintiffs were middle-men only, bringing the parties together and nothing further, the parties themselves making the contract. In *Rupp* v. *Sampson*, 16 Gray (Mass.) 398, the plaintiff was permitted to recover, not for services rendered to the defendant as a broker, but for the performance of a certain specific act, namely, the introduction of the other party to him, the parties after such introduction making their own contract. It was there held that this was not such a fraud upon the other party, who also paid for the service of the plaintiff in introducing him, although concealed from such party, as to make the contract of the plaintiff with the defendant void for illegality. That, however, is not the present case.

It here appears by the bill of exceptions, not only that there was evidence that the plaintiff introduced the parties, but that, through the instrumentality of the plaintiffs, the exchange was effected, and that in effecting such exchange the plaintiffs acted as brokers for both parties. It is to be observed also, that both the instructions asked for by the defendant and those given by the presiding judge proceed upon the ground that the plaintiffs were brokers and not middle-men only.

Exceptions sustained.

QUESTIONS

1. What is meant by the statement that the exceptions were sustained? What is the effect of sustaining exceptions? Why were the exceptions sustained? What error or errors did the lower court commit?
2. "It is to be observed also that both instructions asked for by the defendant and those given by the presiding judge proceed upon the ground that the plaintiffs were brokers and not middle-men only." What is meant by this statement?
3. Suppose that the defendant had been suing the plaintiffs because of their refusal to carry out their agreement to effect an exchange of defendant's stock for real estate, what would the decision have been?
4. P instructs A to sell Blackacre and promises him a commission for his services. T, knowing that A is acting as agent for P, promises A a commission to negotiate a sale of Blackacre to him, T. A negotiates the sale. A brings an action against P for his commission. What decision?

5. A brings an action against P for the commission which P promised. What decision?
6. P and T both know that A is acting for each of them. (*a*) A sues P for his commission. (*b*) A sues T for his commission. What decision in each case?
7. Neither P nor T knows that A is acting for each of them. (*a*) A sues T for his commission. (*b*) A sues P for his commission. What decision in each case?
8. T knows, but P does not know, that A is acting for each of them. (*a*) A sues T for his commission. (*b*) A sues P for his commission. What decision in each case?
9. T knows, but P does not know, that A is acting for each of them. (*a*) T sues P for specific performance of the contract to convey. (*b*) P sues T for specific performance of the contract. What decision in each case?
10. Neither P nor T knows that A is acting for each of them. (*a*) T sues P on the contract. (*b*) P sues T on the contract. What decision in each case?

KNAUSS *v.* GOTTFRIED KRUEGER BREWING COMPANY

142 New York Reports 70 (1894)

Action to recover the reasonable value of services rendered by plaintiff in regard to the sale of the brewery owned by the defendant. The plaintiff was employed by the buyer and the seller. He brought the parties together and they, without his aid, negotiated the sale

PECKHAM, J. This action was brought to recover for services alleged by the plaintiff to have been performed by him for the defendant in regard to the sale of the brewery owned by the defendant, to one Robert Bliss or his assignee.

The answer put the employment in issue and denied that any service had been performed by, or that any sum was due to, the plaintiff touching the subject of such sale. The complaint was dismissed upon the trial and the General Term has affirmed the judgment of dismissal.

Upon looking through the record containing the evidence given on the trial it is clear that the admission made by counsel for respondent in his brief, "that the action was, in fact, tried upon the evidence in disregard of the pleadings," has a good deal of support. We think that it is too late to claim that the plaintiff must be judged entirely by his complaint, as if it had alleged his employment by the defend-

ant as a broker in the strict sense of the word, to obtain a purchaser of the brewery upon terms in regard to which he had some discretion. His evidence on the subject at the trial does not prove any such contract, and there was no evidence given that contradicted him. It showed that he was claiming compensation from the defendant because of his having introduced the president of the defendant to Mr. Bliss, with whom or with whose assigns the defendant subsequently completed a sale of the brewery for $1,822,000.

It is our duty to review the case in the light of the evidence given for the plaintiff, and if there were evidence of any employment substantially within the general scope of the allegations of the complaint, we think it should have been submitted to the jury, unless there were some other fact which also appeared and which constituted a defense to the action. The evidence shows there was evidence of the employment of the plaintiff for the mere purpose of bringing the buyer and seller together, and with the understanding that if a sale were to result the plaintiff was to have some compensation from the defendant for his services. The plaintiff testified that he was to have nothing to do in fixing the price or the terms for the sale; the principals were to do that part of the business; all that he had to do was to bring them together, and if through their subsequent negotiations a sale should result, the plaintiff was to be entitled to some compensation. The real defense which is sought to be maintained is that while acting for the defendant in a matter in which trust and confidence were reposed in him, and where defendant relied upon his unbiased judgment, the plaintiff was at the same time, but unknown to the defendant, in the employment of the proposed purchaser and bound by his duty to such purchaser to do all he could to forward the interest of the purchaser as against the seller.

Upon this question we think the defendant is clearly right as to the law, but we also think there is nothing in the evidence to make it applicable here.

We agree perfectly with the cases of *Carman* v. *Beach* (63 N.Y. 97) and *Murray* v. *Beard* (102 *id.* 508). The cases upon the subject are also collected in the late one of the *Empire State Insurance Company* v. *American Central Insurance Company* (138 N.Y. 446). It is undeniable that where the broker or an agent is invested with the least discretion, or where the party has the right to rely on the broker for the benefit of his skill or judgment, in any such case an employment of the broker by the other side in a similar capacity, or in one

where by any possibility his duty and his interest might clash, would avoid all his right to compensation. The whole matter depends upon the character of his employment. If A is employed by B to find him a purchaser, I can see nothing improper or inconsistent with any duty he owes B for A to accept an employment from C to find one who will sell his house to C upon terms which they may agree upon when they meet. And there is no violation of duty in such case in agreeing for commission from each party upon a bargain being struck, or in failing to notify each party of his employment by the other.

Now this, in substance, is what, according to the plaintiff's evidence, he contracted to do for these parties. He was employed by Bliss to see if he could not obtain customers who would sell their breweries upon terms to be agreed upon by the principals themselves, and he was employed by the defendant to introduce its president to someone who wished to purchase, but the terms and all else regarding the contract were to be agreed upon between defendant and the purchaser. There is a piece of evidence which the defendant claims is fatal to this view, and shows that the plaintiff violated his duty in concealing or in not mentioning his position in regard to Bliss. When the plaintiff came to the president of the defendant for the purpose of entering upon a discussion of the business and to learn whether he was desirous of selling, the plaintiff was inquired of by the president as to the responsibility of the parties the plaintiff spoke of as desiring or proposing to purchase, for it was said by the president that he did not care to go on with the matter or present it to the others unless he knew they (the persons mentioned by the plaintiff) were responsible parties. The plaintiff says he assured the president that they were responsible. From that interview others followed, and finally the plaintiff introduced the president to Mr. Bliss, and the negotiations were thereafter conducted between them and lasted for quite a long time (a number of weeks) before they finally resulted in a sale effected upon terms made up and agreed upon entirely between the parties, without the slightest aid from, or interference on the part of, the plaintiff.

The defendant charges that the statement of the plaintiff that the parties who were intending purchasers were responsible persons was a statement upon which the defendant was entitled to rely and to think that the plaintiff was giving the defendant the benefit of his own honest judgment uninfluenced by any concealed interest of his own in having the sale accomplished. We think this is an erroneous

view of the situation. It is clear that the remark of the plaintiff in reference to the question of defendant's president was merely incidental, and that the question itself was in reality wholly beside the main question of sale. It was plainly interrogatory for the purpose of learning in substance whether it was worth while to take the subject into consideration or whether it might not be mere irresponsible talk by men who had not the slightest intention or power to carry out a sale. It had no bearing and was not asked for the purpose of obtaining knowledge upon the question whether or not to make a sale, or the terms or conditions of the sale if one were to be made. No reliance was placed upon the statement as a foundation for any condition of any contract subsequently made, nor was the question asked for any such purpose. This, we think, is apparent from the nature of the question and the circumstances under which it was asked and the facts that subsequently occurred. On its face the question had nothing to do with the subsequent transactions or with the material facts in the case. It was entirely preliminary in its nature and purpose. The answer might have determined the defendant's president to see the parties and then to make up his own opinion as to whether to go on or not, and as to the terms and conditions of the sale to be made.

The case differs so widely from that of *Holcomb* v. *Weaver* (136 Mass. 265) that we cannot think it necessary to lengthen this opinion by referring to all the material facts in the case cited. In regard to the subject of the double employment, if it be of a nature whereby possibly the interests of the parties may be diverse, we agree that it cannot be upheld if concealed from knowledge. There is nothing of that kind appearing in the contract or agreement with either party as testified to by the plaintiff. The fact that the sale was afterward arranged between the parties exclusively upon terms agreed upon between them and without reference to any previous statement of the plaintiff, shows that it was wholly immaterial, and was not put or answered upon any supposition that it could or would in any manner influence the conduct of the defendant after entering upon the negotiations. The defendant claims the sale was not in fact made to Bliss but to a third party. We think the evidence shows the sale was effected between the parties as contemplated in the contract, and that upon such sale the plaintiff became entitled to a reasonable compensation for the services rendered. He admits in his evidence that the president never said to him what particular sum of money

would be paid him, or what rate of commission, and his compensation will have to be decided upon by the jury at a sum which shall be reasonable for the labor performed. All this has been said as to the case which the plaintiff made out upon the trial. The evidence for the defendant has not been heard, and of course no opinion is expressed or entertained as to the merits of the controversy. It is a question for the jury to determine after hearing both sides.

For that purpose the judgment should be reversed and a new trial granted with costs to abide the event.

QUESTIONS

1. What issue was under consideration in the principal case? How was it decided? What rule of law can be deduced from the decision?
2. How does this case differ from *Rice* v. *Wood?* Why should the agent be entitled to his commission in this case?
3. P directs A to secure a lease of land for him. A leases his own land to P. What are P's rights under the circumstances?
4. P directs A to sell certain personal property. A buys the property in at a fair and reasonable price. What are P's rights under the circumstances?
5. P instructs A to settle a claim which T has against P. A buys the claim at a discount and brings an action to enforce it in full against P. What decision?
6. P directs A to sell stock for cash. A exchanges the stock for bonds which prove to be worthless. P sues A for damages. What decision?
7. A was a caretaker of a building belonging to P. Through A's neglect, pipes in the building froze, causing considerable damage to the building. P sues A for damages. What decision?
8. A misappropriates money which he receives for his principal. What are the legal consequences of his conduct?
9. What is the duty of the agent with reference to money which he receives for his principal?
10. Under what circumstances may an agent delegate his authority to another?
11. Enumerate the various duties which the agent owes to his principal.

D'ARCY *v.* LYLE

5 Binney, Pennsylvania Cases, 441 (1813)

Plaintiff as agent of defendant had been employed to recover goods of defendant from Suckley & Co. at Cape Francois, San Domingo. He secured the goods by judicial proceedings and accounted

to defendant. Afterward the matter was reopened, and plaintiff was given the alternative of paying a large sum because of his having obtained these goods or engage in personal combat to the death with the claimant Richardson. He therefore confessed judgment for $3,000, which it was claimed was the value of the goods, and the sum he afterward paid. The action was for reimbursement from defendant. Verdict for plaintiff and defendant moved for a new trial.

TILGHMAN, C. J. This is one of those extraordinary cases arising out of the extraordinary situation into which the world has been thrown by the French revolution. If the confession of judgment by the plaintiff had been *voluntary*, it would have lain on him to show that the $3,000 were justly due from the defendant to Richardson, or the persons for whom he acted, or they had a lien on the goods of the defendant to that amount. But the confession of judgment was *beyond all doubt* extorted from the plaintiff by duress, and he did not yield to fears of which a man of reasonable firmness need be ashamed. The material fact on which this case turns is whether the transactions between the plaintiff and Richardson were on any *private* account of the plaintiff, or solely on account of the defendant. That was submitted to the jury, and we must now take for granted that the proceedings at the Cape against the plaintiff were in consequence of his having received possession of the defendant's goods from Suckley & Co. I take the law to be as laid down by Heineccious, Turnbull's Heineccious, c. 13, p. 269, 270, and by Erskine in his Institutes, 2 Erskine's Inst. 534, that damages incurred by the agent in the course of the management, of the principal's affairs, or in consequence of such management, are to be borne by the principal.

It is objected that at the time when judgment was rendered against the plaintiff, he was no longer an agent, having long before made up his accounts, and transmitted the balance to the defendant. But this objection has no weight, if the judgment was but the consummation of the proceedings which were commenced during the agency. As such I view them, and I make no doubt that they were so considered by the jury. It is objected again that no man is safe if he is to be responsible to an unknown amount, for any sums which his agent may consent to pay, in consequence of threats or unprincipled tyrants in foreign countries. Extreme cases may be supposed, which it will be time enough to decide when they occur. I beg it be understood, that I give no opinion on a case where an agent should

consent to pay a sum far exceeding the amount of the property in his hands. This is not the present case, for the property of the defendant, in the hands of the plaintiff in 1804, was estimated at $3,000. The cases cited by the defendant show that if the agent on a journey on business of his principal is robbed of *his own money*, the principal is not answerable. I agree to it, because the carrying of his own money was not necessarily connected with the business of the principal. So if he receives a wound, the principal is not bound to pay the expense of his cure, because it is a personal risk which the agent takes upon himself. One of the defendant's cases was, that where the agent's horse was taken lame the principal was not answerable. That I think should depend upon the *agreement of the parties*. If A undertakes for a certain sum to carry a letter for B to a certain place, A must find his own horse and B is not answerable for any injury which may befall the horse in the course of the journey. But if B is to find the horse, he is responsible for the damage. In the case before us, the plaintiff has suffered damage without his fault, *on account of his agency*, and the jury have indemnified him to an amount, very little if at all exceeding the property in his hands, with interest and costs. I am of opinion that the verdict should not be set aside.

QUESTIONS

1. What is the theory underlying the plaintiff's action in this case? What rule of law can be deduced from the decision?
2. Suppose that the plaintiff had sustained a personal injury while attempting to recover the goods of the defendant, would the plaintiff have been entitled to damages for the injury in an action against P?
3. P directs A to take possession of certain goods which P claims as his own. A does as directed. The goods in question actually belong to T who sues A in trover and recovers damages from him. What are A's rights against P?
4. In the foregoing case, A knew that the goods in question belonged to T when he took possession of them. What are A's rights against P?
5. P directs A to buy goods on his account but does not furnish the money with which to pay for them. A is compelled to pay for the goods out of his own money in order to get them. What are his rights against P?
6. P directs A to perform certain services for him. Nothing is said between them as to compensation. A performs the services as requested. What are his rights against P?
7. P directs A to find a purchaser for Blackacre and promises him a commission for his services. A finds T who is willing to buy the land

on the terms specified by P. In the meantime, however, P has sold Blackacre to X. What are A's rights, if any, against P?

8. P says to A: "If you will sell Blackacre for me, I will pay you $250." A expends considerable time and money in finding T who is willing to buy the land. P, however, revokes A's authority to sell the land before the deed is executed. What are the rights of A against P?

b) As between Principal and Third Person

EVANS *v.* DAVIDSON

53 Maryland Reports 245 (1880)

ALVEY, J. The only substantial question in this case is whether the defendant, the present appellee is liable for the wrongful act of his servant in killing the plaintiff's cow, while driving her out of the defendant's cornfield.

It appears in proof that the defendant is a farmer, and that his farm adjoined that of one Boulden; that he had employed on his farm a negro Lewis, and two other negro hands, and that they were employed for a period of nine months to do general work on the farm; that on the day the plaintiff's cow was killed, the defendant was away from home, and that the three negro servants or hirelings were at work in the cornfield cultivating the corn when a herd of cattle consisting of about thirty head, among which was the plaintiff's cow, broke into the defendant's cornfield, where his hirelings were at work, from the adjoining farm belonging to Boulden; and that, upon discovering the cattle among the corn, the servants "immediately started to drive them out, and in doing so the said negro Lewis negligently struck the plaintiff's cow with a stone, and killed her before she had left the field." There was also proof on the part of the defendant that he had given no orders in regard to driving cattle out of the field, and that he did not know that the cattle were in the cornfield until after the cow had been killed.

The court below, at the instance of the defendant, instructed the jury that there was no evidence in the cause legally sufficient to entitle the plaintiff to recover. To this ruling and the rejection of the prayers offered by the plaintiff, the latter excepted.

There is no question as to whether the relation of master and servant existed between the defendant and the party doing the wrongful act complained of; that is conceded. But the question is whether

the act of driving the cow out of the field was within the scope of the servant's employment, under the circumstances of the case.

If that act was, either expressly or by fair implication, embraced within the employment to do general farm work on the defendant's farm then it is clear the latter is liable for any wrong or negligence committed by the servant in doing the act authorized to be done. In one sense, where there is no express command by the master, all wrongful acts done by the servant may be said to be beyond the scope of the authority given, but the liability of the master is not determined upon any such restricted interpretation of the authority and duty of the servant. If the servant be acting at the time in the course of his master's service and for his master's benefit, within the scope of his employment, then his act, though wrongful or negligent, is to be treated as that of the master, although no express command or privity of the master be shown. This general principle is sanctioned by all the authorities. Therefore, the fact that the master gave no express direction with regard to driving the cattle out of the cornfield, and did not know of their being in it until after the doing of the injury complained of, will not avail to exculpate the master, if the servant was acting in the course of his employment.

Was the servant acting in the course of his employment? What is embraced as commonly understood by general farm work? In the very nature of the employment there must be some implied authority and duties belonging to it, and this as well for the protection of the master as third parties. If, for instance, a servant thus employed should see a gate open or a panel of fence down, through which a herd of cattle might or would likely enter and destroy his master's grain, we suppose all would say that it would be the positive duty of the servant to close the gate or put up the fence to prevent the destruction of the grain; and if he should pass by and wilfully neglect such duty, it would constitute cause and a sufficient justification for the discharge of the servant. If this be so, how much more imperative the duty, where, as in this case in the absence of the master, the servant being in the field at work and seeing a herd of cattle break into the field, and in the act of destroying the corn, to drive out the cattle and thus save the corn from destruction. To do such an act for the preservation of the growing corn must be regarded as ordinary farm work, such as every farmer employing a servant to do general farm work would reasonably contemplate and have a right to expect as a matter of duty from the servant. The servant,

therefore, was acting in the regular course of his employment in driving out the cattle, and if he did, while driving them out, commit the wrong complained of, the master is liable therefor.

It follows that we cannot concur with the court below in the instruction given to the jury; and for the reason already stated, we think the first and second prayers offered by the plaintiff should have been granted. The plaintiff's third prayer seems to have been intended, not so much an instruction of the law on the case, as an instruction as to the conclusion of fact at which the jury were at liberty to arrive upon finding certain other facts. This form of prayer is not free from objection, and there was no error in rejecting it.

Judgment reversed and new trial awarded.

QUESTIONS

1. What instruction did the trial court give to the jury? What instruction should it have given?
2. Did the defendant ever direct his servants to drive cows out of his cornfield? If not, where did the servants get their power to act for the defendant in doing so?
3. Would the plaintiff have had any cause of action against the servants in this case?
4. P directs A to injure T. A does so. What are T's rights?
5. A, while delivering groceries for P, negligently runs over T with the wagon. (*a*) T sues P for damages. (*b*) T sues A for damages. What decision in each case?
6. A, while using the wagon for his own ends, negligently runs over T. (*a*) T sues P for damages. (*b*) T sues A for damages. What decision in each case?
7. A, an engineer, intentionally permits steam to escape from the engine for the purpose of frightening T's horse. The horse runs away and injures T. (*a*) T sues the company for damages. (*b*) T sues A for damages. What decision in each case?
8. A, a conductor on a train of the D Co., kisses a female passenger against her will. She brings an action against the company for damages. What decision?
9. P directs A to sell his automobile. T, a prospective purchaser, asks A how long the machine has been used. A states that it has been used only four months, knowing that the statement is false. In reliance on the statement, T buys the machine. What are the rights of T?
10. What is the test as to whether a principal is liable for torts committed by his agents and servants?
11. Why should the principal under any circumstances be held responsible for the wrongs of his agent?

POLE *v.* LEASK

33 Law Journal Reports [Equity] 155 (1863)

LORD CRANWORTH. My lords, before I examine in detail the facts of this case, I desire to advert very shortly to one or two general propositions connected with the law of agency which, I think, were sometimes lost sight of in the argument of the case at your lordship's bar. First, as to the constitution by the principal of another to act as his agent. No one can become the agent of another person except by the will of another person. His will may be manifested in writing or orally, or simply by placing another in a situation in which, according to the ordinary rules of law, or perhaps it would be more correct to say according to the usual usages of mankind, that other is understood to represent the act for the person who has so placed him; but in every case it is only by the will of the employer that an agency can be created.

This proposition is not, however, at variance with the doctrine, that where one has so acted as from his conduct to lead another to believe that he has appointed someone to act as his agent, and knows that that other person is about to act on that behalf, then, unless he interposes, he will in general be estopped from disputing the agency, though in fact no agency really existed. It is, however, necessary to bear in mind the difference between this agency by estoppel, if I may so designate it, and a real agency, however constituted.

Another proposition to be kept constantly in view is that the burden of proof is on the person dealing with anyone as agent, through whom he seeks to charge another as principal. He must show that the agency did exist and that the agent had the authority he assumed to exercise, or otherwise that the principal is estopped from disputing it.

Unless this principle is strictly acted on, great injustice may be done as a consequence; for anyone dealing with a person assuming to act as agent for another can always save himself from loss or difficulty by applying to the alleged principal to know whether the agency does exist and to what extent. The alleged principal has no similar mode of protecting his interests; he may be ignorant of the fact that anyone is assuming to act for him or that persons are proposing to deal with another under the notion that that other is his agent. It is therefore important to recollect constantly where the burden of proof lies.

QUESTIONS

1. What is meant by the statement that no one can become the agent of another person except by the will of such person? Does this mean that the relation must be created by a contract between them?
2. What is the difference between actual authority and implied authority?
3. What is meant by the apparent authority of an agent? Is it the same as authority by estoppel?
4. What is authority by ratification? What are the elements of a valid ratification?
5. What is authority by necessity?
6. The court says that the "burden of proof is on the person dealing with anyone as an agent, through whom he seeks to charge another as principal." What is meant by this?
7. T wishes to prove that A is an agent of P. The only evidence that he has is a statement of A that he represents P. Is the evidence admissible to prove the existence of the relation? If not, why not?
8. Must the appointment of an agent be made in writing? Under what circumstances, if any, must a grant of authority be under seal?

PICKERT *v.* MARSTON

68 Wisconsin Reports 465 (1887)

This was an action for goods sold and delivered. By way of defense, the defendant relied on a breach of warranty of other goods sold to him by the plaintiff through an agent. The defendant had judgment in the lower court.

CASSODAY, J. The evidence is undisputed that the fish were in good condition when shipped to the defendants from Boston and worthless when they reached LaCrosse. The defendant made the contract of purchase at LaCrosse with the plaintiff's traveling salesman who resided in Chicago. There was evidence tending to prove that the fish shipped were not the fish ordered; and also by the terms of the contract, the fish ordered were guaranteed by the traveling salesman to reach the defendant in LaCrosse in good marketable condition. The evidence on the part of the plaintiff was to the effect that the traveling salesman had no authority to make such a guaranty nor any assurance as to the condition in which the fish should be on reaching LaCrosse; and that he so informed the defendant about a month prior to the taking of the order in question.

The issue does not arise between principal and agent, but between the principal and the defendant who made the contract of purchase

with the agent. The agency and the right to contract for the sale are admitted. But the authority to make the guaranty or warranty is denied. Beyond question an agent may bind his principal if he does not exceed the power with which he is ostensibly invested, notwithstanding he has secret instructions from his principle to the contrary. *Putnam* v. *French*, 53 Vt. 402, 38 Am. Rep. 682; *Bentley* v. *Doffett*, 51 Wis. 224, 27 Am. Rep. 827; *Bouck* v. *Enos*, 61 Wis. 664. Assuming that the traveling salesman had no actual authority to make such guaranty or warranty of the fish, then it became important to determine whether this authority to sell or contract for the sale clothes him with an implied authority to make such a guaranty or warranty. "The general rule is as to all contracts, including sales," says a late learned author, "that the agent is authorized to do whatever is usual to carry out the object of his agency, and it is a question for the jury to determine what is usual. If in the sale of the goods confided to him it is usual in the market to give a warranty, the agent may give that warranty in order to effect a sale."

Thus in *Dingle* v. *Hare*, *supra*, ERLE, C. J., observed: "The strong presumption is that when the principal authorizes an agent to sell goods for him he authorizes him to give all such warranties as are usually given in the particular trade or business"; and BYLES, J., added: "An agent to sell has a general authority to do all that is usual and necessary in the course of such employment." So in *Smith* v. *Tracy*, *supra*, PORTER, J., speaking for the court said: "The rule applicable to such a case is stated with discrimination and accuracy by our leading textbook (Parsons) on the Law of Contracts: 'An agent employed to sell, without express power to warrant, cannot give a warranty which shall bind the principal, unless the sale is one which is usually attended with warranty.'"

Here the plaintiff offered to prove by different witnesses having the requisite knowledge the general customs of the trade as known and universally followed by dealers in fish, as to their being warranted and guaranteed against spoiling or turning red in transit, but it was excluded, and we think erroneously, under the rules of law stated above. It would seem, however, that to be binding upon the defendant, such custom should be known to them or exist in their section of the country. Thus in *Graves* v. *Legg*, *supra*, it was said by COCKBURN, C. J.: "The only question is whether, when the merchant residing in London contracts with a Liverpool merchant in Liverpool, he is bound by the usage of trade at Liverpool. We think that as he

employed an agent at Liverpool to make contracts there, it must have been taken to have been made with all the incidents of a contract entered into at Liverpool, and one is that notice to the buyer's agent is notice to the principal."

The judgment of the circuit court is reversed and the cause is remanded for a new trial.

QUESTIONS

1. What issue was under consideration in this case? How was the issue decided? What rule of law can be deduced from the decision?
2. What test did the court lay down for determining whether in a given case an agent to sell has authority to warrant the goods he sells?
3. A sells five horses to T for P and warrants them to be sound of wind and limb. T sues P for damages and shows that the horses are not sound as warranted. P contends that he is not liable because he directed A not to give warranties of any kind. T offers evidence tending to show that there is a custom, in the locality where the sale took place, for agents to warrant the soundness of horses. Should the evidence be admitted?
4. A sells and delivers a horse for P to T. He receives the purchase price and absconds with it. P sues T for the price of the horse. What decision?
5. A has power to sell and deliver horses for P. He trades one of P's horses to T for an automobile. P sues T to recover possession of his horse. What decision?
6. A sells and delivers a horse for P to T on credit. P sues T for the possession of his horse, showing that A had no authority to sell on credit. What decision?
7. P directs A to sell grain for him. A makes a contract to sell grain to T. Later A and T agree to rescind the contract. P sues T for his refusal to receive and pay for the grain. What decision?
8. P authorized A to sell and deliver a horse to X. A sells and delivers the horse to T. P sues T for possession of the horse. What decision?
9. P authorizes A to sell and deliver his automobile but directs him not to sell it for an amount less than $1,800. A sells and delivers the machine to T for $1,500. What are P's rights under the circumstances?

KOMOROWSKI *v.* KRUMDICK

56 Wisconsin Reports 23 (1882)

This action was commenced in a justice's court to recover the value of about 180 bushels of wheat which the plaintiff alleges he sold and delivered to one Grist, agent of the defendants. The plaintiff

recovered in the justice's court, and the defendants appealed to the circuit court. Upon trial in that court the jury returned a verdict for the plaintiff against the defendants for the value of the wheat, and the defendants appeal to this court.

TAYLOR, J. The power of Grist as the agent of the defendants was limited to purchases for cash, and nothing else, and he was expressly prohibited from taking wheat in store on their account. When the principal furnishes his agent, to buy on his account, sufficient funds to make the purchases, the law does not raise any presumption that such agent may bind his principal by a purchase on credit, but the contrary. And in such case the principal will not be bound by a purchase made on credit, unless he has knowledge of the fact, and does something in ratification thereof, or unless it be shown that it is the custom of trade to buy upon credit. The defendants furnished Grist the money to pay for all purchases made by him on their account, and the evidence tends to show that Grist did not deliver to them enough wheat to cover the amount of their advances.

There is nothing in the evidence tending to show that the defendants held Grist out as having any other powers as their agent than those expressly conferred upon him. There is no evidence that the defendants had ever ratified any purchase by Grist for them on credit. There is, in fact, no evidence that he ever made any purchase except of the plaintiff on credit. Nor is there any evidence that an agent to purchase wheat for a principal at a given place, and to ship the same to the principal at another place, has any implied authority to make the purchases upon the credit of the principal. There is nothing in the nature of the business itself, in the absence of any evidence as to the custom of the trade, which would justify the court in determining as a question of law that an agent to purchase wheat and other grain may bind his principal by a purchase on credit.

An agent to buy wheat or other grain must, in order to bind his principal who furnishes in advance funds to make the purchases, buy for cash, unless he has express power to buy upon credit or unless the custom of the trade is to buy upon credit; and in the absence of express authority or proof of the custom of the trade to buy on credit. such agent cannot bind his principal by a purchase upon credit of a person who is ignorant of his real authority as between himself and his principal.

If the evidence is sufficient to show a sale upon credit to Grist as agent of the defendants, and that the wheat was delivered to the

defendants and received by them of Grist, still they would not be liable to the plaintiff unless they received the wheat knowing it had been bought upon credit, or that they had received the wheat of Grist knowing they had no funds in his hands at the time sufficient to pay for the same. If they furnished money to their agent sufficient at all times to pay for all the wheat they received from him, they had the right to suppose that all the wheat bought by Grist for them was paid for at the time it was delivered to them, and, if he had not in fact paid for it, they would only be liable to the seller under the circumstances stated above.

The judgment of the circuit court is reversed and the cause remanded for a new trial.

QUESTIONS

1. What authority did Grist possess in this case? Was he furnished funds with which to pay for the goods purchased on his principals' account? What did he do with this money?
2. Does this case decide that the defendants are entitled to keep the goods of the plaintiff without paying for them? Does this seem fair to the plaintiff?
3. What rule does this case lay down as to the power of an agent to buy goods on the credit of his principal?
4. P directs A to buy cotton for him but does not furnish funds with which to pay for the cotton. A buys cotton from T on credit of P. T sues P for the price of the cotton. What decision?
5. P furnishes A money with which to buy cotton. A buys cotton on P's credit from T and misappropriates the money advanced to him by P. T sues P for the price of the cotton. What decision?
6. P directs A to buy fifty bales of cotton for him. A buys seventy-five bales from T. P receives and pays for fifty bales but refuses to receive and pay for the balance. T sues P for the price of the remaining bales of cotton. What decision?
7. P directs A to buy cotton and to pay no more than 15 cents a pound for it. A buys cotton from T at 17 cents a pound. What are P's rights under the circumstances?
8. P directs A to buy grain and furnishes no funds with which to pay for it. A negotiates with T for the purchase of grain on credit of P. T asks A about P's financial standing. A, with knowledge that P is practically insolvent, states that P is well able to meet all his obligations. In reliance on this statement, T sells goods to A for P on credit. What are the rights of T under the circumstances?

WALLIS TOBACCO COMPANY *v.* JACKSON

99 Alabama Reports 460 (1892)

This was an action of assumpsit brought by the Wallis Tobacco Company against J. F. B. Jackson for tobacco sold to an agent of the defendant to be used in the Magic City Hotel. The cause was tried without the intervention of a jury, and upon the introduction of all the evidence, the court rendered judgment for the defendant.

HEAD, J. The evidence in this case wholly fails to show that the goods, for the price of which this suit is brought, were reasonably necessary for the uses and purposes of the hotel which it is claimed McCants was conducting as agent for the defendant; or that they were such goods as were customarily used in the business of a hotel, or, indeed, that they were at all used in the business of the particular hotel. For aught the evidence discloses, they may have consisted of a stock of general merchandise, or of agricultural implements, or some other commodities, having no use or place, either by custom or necessity, in the business of a hotel. If McCants was conducting the hotel as agent for the defendant, as contended, and as such was authorized to purchase supplies on credit, his agency extended no farther than the right to purchase such supplies as were reasonably adapted to, or customarily used in, a business of that kind; and it is the duty of the party selling, under such circumstances, to know that the goods sold are of such character as the nature of the business authorized the agent to purchase, and in a suit against the principal for the price, the burden is on him, the seller, to prove the fact.

This principle is invoked by the defendant's counsel, and, as we read this record, we can see no escape from its proper application to this case. It is unnecessary to consider the other questions. The judgment of the City Court of Birmingham is affirmed.

QUESTIONS

1. What issue was under consideration in the principal case? How was the issue decided? What rule of law can be deduced from this decision?
2. Do you infer from this decision that the defendant had the benefit of the plaintiff's goods and yet escaped without paying for them?
3. In the principal case, the plaintiff offers evidence tending to show that it is customary for hotel managers to buy tobacco on credit for hotel purposes. Should the evidence be admitted?
4. The plaintiff offers evidence tending to show that tobacco is reasonably necessary in the successful operation and management of a hotel. Should the evidence be admitted?

5. P appoints A as manager of a grocery business, without specifying A's particular powers. A contracts for a consignment of groceries on P's credit. T sues P for his refusal to receive and pay for the groceries. What decision?
6. A sells groceries on credit to T, a customer. P sues T for conversion of the goods. What decision?
7. A borrows money from T with which to buy groceries for the business. A does not buy groceries but absconds with the money. T sues P for the money. P contends that he is not liable because A had no authority to borrow money. What decision?
8. A contracts to buy a consignment of groceries from T and gives T a promissory note in P's name in payment for them. P refuses to accept the goods. T indorses the note to H, a holder in due course, who sues P on the note. What decision?
9. A executes a chattel mortgage on the stock in trade and store fixtures to secure a debt of the business. T brings proceeding to enforce the mortgage. P contends that the mortgage is invalid because A had no power to execute it. What decision?
10. A sells the business outright to T. P sues T for possession of the business, contending that A had no power to sell the business. What decision?

DOMASEK *v.* KLUCK

113 Wisconsin Reports 336 (1902)

The plaintiff, about April 15, 1899, sold his potatoes to the amount of $329.45 to one Julius Werachowski upon the latter's statement, as plaintiff claims, that the purchaser was an agent for the defendant. That agency is denied. Plaintiff offered evidence of the course of business by Werachowski, with knowledge on the part of the defendant, both for the purpose of justifying an inference of agency in fact or an apparent agency permitted by the defendant, and also offered evidence of subsequent affirmance of the purchase and promise to pay by the defendant in person. All these contentions were controverted. The jury found a general verdict in favor of the plaintiff, upon which judgment was rendered, wherefrom defendant brings this appeal.

DODGE, J. The only remaining assignment of error is to the charge of the court. Thereby he seems to have submitted to the jury only two grounds of liability, namely, that of holding out of Werachowski as an agent, relied on by the plaintiff, and ratification. Defendant does not contend that there is any error in the instructions on the former

issue as abstract propositions of law, but that the issue was not raised by the evidence, and the instruction to the jury thereon was misleading, and an intimation to them that they might find such holding out when the evidence did not warrant it. The instructions present to the jury the three elements necessary to bind upon the doctrine of putative or apparent agency, namely, acts by the agent or principal justifying belief in the agency, knowledge thereof by the defendant, and reliance thereon by the plaintiff, consistently with ordinary care and prudence. We find no variance between the instructions given and the law as most recently laid down in *McDermott* v. *Jackson*, 97 Wis. 74. We cannot agree with the appellant's contention that there is no evidence to justify the submission of this issue. It was in proof that Werachowski had for a long time been buying potatoes and putting them in the warehouse belonging to the defendant, that the potatoes so bought and so stored had customarily been treated as the defendant's, and shipped out to customers in his name, that this method of doing business was the same as had been pursued during the time that defendant was associated with Lukasavitz, when confessedly Werachowski was agent, with authority to buy. There was abundant evidence of defendant's knowledge of all these things, and the plaintiff had testified that he had known how the business was run for a year or two prior to the alleged sale, and that he knew that Werachowski was engaged in buying potatoes for the defendant, and that he sold them to Werachowski for the defendant. Many other facts might be recited, but it suffices to say that the record discloses at least some evidence justifying an inference by the jury of each of the three elements of putative agency mentioned above.

We conclude that none of the errors are well assigned and the judgment is affirmed.

QUESTIONS

1. What is the theory upon which the defendant was held liable in the principal case?
2. What instructions were given by the trial judge to the jury in the court below? What rule or rules of law are involved in these instructions?
3. For a period of six or eight months, A bought grain on P's account which P accepted and paid for. T, with knowledge of these dealings, entered into a contract through A to sell grain to P. T sues P for his refusal to accept and pay for the grain. P proves at the trial that he had never expressly given A any power to buy grain for him. What decision?

4. X, without knowledge of the fact that A had previously bought grain for P, entered into a contract through A with P to sell grain, relying solely on A's statement that he was agent for P. What decision in an action by T against P for the latter's refusal to accept and pay for the grain?
5. P directed A to buy corn for him and told him not to pay more than $2 a bushel for it. A bought corn from T at $2.25 a bushel. T sued P for his refusal to accept and pay for the corn at $2.25 a bushel. What decision?
6. P directed A to buy corn and told him not to buy more than 500 bushels. A bought 600 bushels from T. T sued P for his refusal to accept and pay for the 600 bushels of corn. What decision?
7. P authorized A to sell and deliver a horse for him but directed him not to sell the animal to T. A does sell the horse to T. P sues T for possession of his property. What decision?

KAYTON *v.* BARNETT

116 New York Reports 625 (1885)

Plaintiffs sold goods to one Bishop for $4,500. He paid $3,000 on delivery and gave three notes for the balance. He died insolvent, not having paid any of the notes. Afterward, plaintiffs tendered these notes to defendants and sued them to recover the $1,500 on the ground that Bishop was really acting as agent for defendants in making the promise. Defendants denied the agency. Judgment for defendants below.

FOLLETT, C. J. When goods are sold on credit to a person whom the vendor believes to be the purchaser and he afterward discovers that the person credited bought as agent for another, the vendor has a cause of action against the principal for the purchase price. The defendants concede the existence of this general rule, but assert it is not applicable to this case, because, while Bishop and the plaintiffs were negotiating they stated they would not sell the property to the defendants, and Bishop assured them he was buying for himself and not for them.

It appears by evidence, which is wholly uncontradicted, that the defendants directed every step taken by Bishop in his negotiations with the plaintiffs; that the property was purchased for and delivered to the defendants, who have ever since retained it; and that they paid the $3,000 toward the purchase price and agreed with Bishop,

after the notes had been delivered, to hold him harmless from them. Notwithstanding the assertion of the plaintiffs that they would not sell to the defendants, they, through the circumvention of Bishop and the defendants, did sell the property to the defendants, who have had the benefit of it, and have never paid the remainder of the purchase price pursuant to their agreement. Bishop was the defendants' agent. Bishop's mind was in this transaction the defendants' mind, and so the minds of the parties met and the defendants having through their own and their agent's deception, acquired the plaintiffs' property by purchase, cannot successfully assert that they are not liable for the remainder of the purchase price because they, through their agent, succeeded in inducing the plaintiffs to do that which they did not intend to do and perhaps would not have done had not the defendants dealt disingenuously.

The judgment should be reversed and a new trial ordered.

QUESTIONS

1. What rule of law does the principal case lay down? Is there any business justification for the doctrine announced by this case?
2. Did the plaintiffs suppose, at the time of the transaction in question, that they were dealing with the defendants? In fact, did they not state that they would not sell the property to the defendants? On principles of contract, how can defendants be made parties to the agreement?
3. What would have been the decision in this case had the plaintiffs brought action against the defendants on the notes?
4. If Bishop had not become insolvent could the notes in question have been enforced against him?
5. A makes a contract with T for P. A tells T that he is acting in a representative capacity but does not state who his principal is. T sues P on the contract. What decision?
6. A makes a contract with T for P. T enters into the agreement without any knowledge that A is acting for P. This is an action by T against P on the contract. What decision?
7. A enters into a written contract with T for P, although P's name does not appear in the written instrument and T is ignorant that the contract is for P. T sues P on the written agreement. What decision?
8. A enters into a sealed contract with T for P. P's name nowhere appears in the instrument. T sues P on the contract. What decision?
9. A executes a promissory note for P in favor of T, but signs his own name to it. T sues P on the note. What decision?
10. A acting for P buys goods from T on credit. Upon receipt of the goods P pays A and directs him to settle with T. A, however, misappropriates

the money. T takes no steps to collect from A and about six months later, A becomes hopelessly insolvent. T then discovers that the contract was made for P and brings an action against him for the purchase price of the goods. What decision?

KINGSLEY *v.* DAVIS

104 Massachusetts Reports 178 (1870)

This was an action of contract by brokers for commissions. The case was submitted to the judgment of the court on these agreed facts:

The plaintiffs on November 12, 1868, procured a purchaser for a house belonging to the defendant who is, and was at that time, a married woman, and held the legal estate in said house in her own right. Previously John J. Davis, her husband, in his own behalf and acting also for her and in her presence, requested the plaintiffs to find a purchaser for the house; and in the conversation between the parties at that time the defendant also requested the plaintiffs to find a purchaser. On November 20, 1868, the defendant executed a deed of the house to the purchaser obtained by the plaintiffs, her husband joining therein. The plaintiffs at the time they performed said services supposed that the legal title to the house was in John J. Davis, and they charged him therefor on their books of account. On December 14, 1868, they commenced an action of contract against him in the Municipal Court of the city of Boston, in which they declared for the same cause of action for which they bring the present action. In said action, on December 29, he was defaulted and on March 18, 1869, the plaintiffs, since said default being informed of all the facts and in particular of the fact that the house belonged to the present defendant at the time they procured the purchaser, caused judgment to be entered against John J. Davis in said action and subsequently took out execution against him. Said judgment now remains in force and unsatisfied. After taking said judgment and execution, the plaintiffs brought the present action.

MORTON, J. We are unable to see how, in any aspects of the facts of this case, the plaintiffs can recover. There is no evidence that the plaintiffs performed the services sued for upon the credit of the defendant, or that she entered into a several contract with them. The facts stated, if they show any contract by the defendant, show a joint contract by herself and her husband. Upon such a contract the plaintiffs could not maintain this action.

The judgment which he has taken against one of the joint debtors is a bar to any future action against the other. *Ward* v. *Johnson*, 13 Massachusetts, 148; *Gibbs* v. *Bryant*, 1 Pick. 118.

But the true inference to be drawn from the facts stated undoubtedly is that the plaintiffs contracted with, and gave credit to, John J. Davis, and they now claim that he was acting as the agent of the defendant and that they gave him credit in ignorance of this fact. If we assume that he was acting as her agent in contracting with the plaintiffs, yet there is an insuperable obstacle to their right to maintain this action. The general principle is undisputed that, when a person contracts with another who is in fact an agent of an undisclosed principal, he may, upon discovery of the principal, resort to him or to the agent with whom he dealt, at his election. But, if after coming to a knowledge of all the facts, he elects to hold the agent, he cannot afterward resort to the principal. In the case at bar, it is admitted that the plaintiffs after all the facts became known to them, obtained a judgment against John J. Davis upon the same cause of action for which this suit is brought. We are of the opinion that this was conclusive evidence of an election to resort to the agent, to whom the credit was originally given, and is a bar to this action against the principal. *Raymond* v. *Crown & Eagle Mills*, 2 Metc. 319.

Judgment for the defendant.

QUESTIONS

1. Precisely what does the principal case decide? What interesting *dictum* does the judge state in this case?
2. A enters into a contract with T for P. A informs T that he is acting in a representative capacity but does not tell him who his principal is. What are T's rights when P is disclosed?
3. A enters into a contract with T for P without informing T that he is acting in a representative capacity. What are T's rights on the contract when P is disclosed?
4. T sells goods to A on credit without knowledge that A is buying the goods for P. After P is disclosed, T continues to charge A on his books for the amount due. Later, T brings an action against P for the price of the goods. P contends that he is not liable because T has evidenced an election to hold A. What decision?
5. T makes out and sends a bill to A for the goods after P is disclosed. T then sues P for the price of the goods. What decision?
6. T accepts a promissory note of A for the amount due. Later he starts an action against P. What decision?

7. T begins an action against A for the price of the goods after P is disclosed. Later he brings an action against P. What decision?
8. T secures a judgment against A after knowledge that A was acting for P. Being unable to get satisfaction of the judgment from A, he brings this action against P. What decision?
9. T secured the judgment against A in ignorance of the fact that A was acting for P. When P is disclosed, T starts an action against him for the price of the goods. What decision?
10. In the last case, T obtained satisfaction of his judgment before P was disclosed. What are his rights, if any, against P after the disclosure of the latter?
11. What is meant by the doctrine of election? Who determines whether an election has been made by the third person? Can there be an election by the third person before the principal is disclosed?

BERNSHOUSE *v.* ABBOTT

45 New Jersey Law Reports 531 (1883)

DEPUE, J. The transaction was a sale of personal property by an agent who had authority to sell, and who sold in his own name without disclosing his agency, to a purchaser who bought in good faith believing that the agent was the owner, and the inquiry is, under what circumstances such a purchaser in an action by the principal for the contract price is entitled to set off a debt due him from the agent.

The son, when he negotiated the sale, had neither the possession of the property nor any muniment of title to it in himself. He sold it in his own name without any authority from his father to sell it in that way.

The two leading cases on the subject of the right of a purchaser of personal property to set off a debt due to him from the agent through whom the sale was made, where an action has been brought by the principal to recover the contract price, are *Rathbone* v. *Williams*, reported in a note to *George* v. *Claggett*, 7 T. R. 359, and *Baring* v. *Corrie*, 2 B. & Ald. 137. In *Rathbone* v. *Williams*, the action was for the value of the goods sold. The sale was made through Rathbone, Sr., & Co., who were the plaintiff's factors, and had sold the goods in their own names as principals without disclosing their agency. The purchaser, in an action by the principal for the contract price, was allowed to set off a debt due to him from the factors. In *Baring* v. *Corrie*, the sale was made by a broker,

who did not disclose his principal; and the purchaser in an action for goods sold brought by the principal was not allowed to set off a debt he had against the broker.

The distinction between these two cases is explained by ABBOTT, C. J., in his opinion in *Baring* v. *Corrie*.. He says: "The distinction between a broker and a factor is not merely nominal, for they differ in many important particulars. A factor is a person to whom goods are consigned for sale, and he usually sells in his own name, without disclosing that of his principal. The latter, therefore, with a full knowledge of these circumstances, trusts him with the actual possession of the goods, and gives him authority to sell in his own name. But the broker is in a different situation. He is not trusted with the possession of the goods, and he ought not to sell in his own name. The principal, therefore, who trusts a broker has a right to expect that he will not sell in his own name." And, referring to the cases cited in which the set-off had been allowed, including *Rathbone* v. *Williams*, the Chief Justice said that "in all the cases cited, the factor was in actual possession of the goods, and the purchaser could not know whether they belonged to him or not, and at all events, they knew that he had a right to sell the goods." In *Baring* v. *Corrie*, where the claim of set-off was disallowed, the property sold was not in the possession of the broker who negotiated the sale. It was lying in the West India docks from which it could not be obtained without a delivery order countersigned by the plaintiff's custom-house clerk, and, as was said by BAILEY, J., "the plaintiffs did not trust the broker with either the muniments of their title or the possession of the goods, as was done both in the case of *Rathbone* v. *Williams* and that of *George* v. *Claggett*."

Mr. Chitty, with characteristic exactness, states the principle to be that "Where a principal permits one who is not known to be an agent to sell as apparent principal, and afterward intervenes, the buyer is entitled to be placed in the same situation at the time of the disclosure of the actual principal as if the agent had been the real contracting party; and he is entitled to the same defence against the principal, whether it be by common law or by statute, as he was entitled to at that time against the agent, the apparent principal. Accordingly, if in such a case the defendant has acquired a set-off against the agent, before the principal has interposed, the latter will be bound by the set-off." "But," he adds, "this doctrine does not apply where the agent is a mere broker, and has not the possession

of or is not intrusted with the *indicia* of property in the goods." Chitty, Contracts, 306.

In the case now before the court the son had neither the possession nor the *indicia* of property. He was an agent with a naked power to sell. The judge properly denied the defendant's claim to set off the son's debt, and the judgment should be affirmed.

QUESTIONS

1. What issue was under consideration in the principal case? How was the issue determined? What rule of law can be deduced from the decision?
2. Does it appear in the principal whether the agent had authority to conceal the principal? Suppose that the principal had directed the agent to conceal him, do you think the decision would have been the same?
3. Did the agent have possession of the goods at the time he sold them? Suppose that he had had possession of the goods, would the decision of the court have been the same?
4. A makes a contract with T for P, his undisclosed principal. P brings an action on the contract against T. What decision?
5. A makes a written contract with T for an undisclosed principal. P sues T on the contract. T contends that he is not liable to P on the contract because P's name does not appear in the written agreement. What decision?
6. A makes a sealed contract with T for an undisclosed principal. P sues T on the contract. What decision?
7. T executes a promissory note to A who is acting for P, an undisclosed principal. P brings an action against T on the note. What decision?
8. A, acting for an undisclosed principal, enters into a contract with T to paint T's portrait. T refuses to accept the portrait painted by P. P sues T for damages. What decision?
9. A, acting for an undisclosed principal, contracts to sell land to T and to give the "usual warranties." P tenders a deed to the land in question, with the usual warranties. T refuses to accept the deed. P sues T for specific performance of the contract. What decision?
10. A, acting for an undisclosed principal, contracts to buy a large consignment of goods from T on credit. T refuses to sell and deliver the goods to P on credit. P sues T for breach of the alleged contract. What decision?
11. T offers to sell goods to A but states that he will not sell to P. A buys them for P, an undisclosed principal. T refuses to deliver the goods to P. P sues T for damages. What decision?

12. P directs A to buy goods for him on credit. A buys goods from T for P and represents falsely that P is solvent. A knows that P is insolvent and makes the statement to deceive T. What are the rights of T under the circumstances?

c) *As between Agent and Third Person*

BELL *v.* JOSSELYN

3 Gray's Massachusetts Reports 309 (1855)

Action of tort for negligently allowing water to be admitted to a water pipe in the second story of a building, so that it flowed through and from that pipe into the shop of the plaintiff in the lower story.

At the trial at January term 1854 of the court of common pleas, before WELLS, C. J., there was evidence tending to show that this building was one of a block which belonged to the defendant's wife, but which he managed, executing leases, receiving rents and making repairs in his own name; that the Cochitutate water was supplied to the block by one main pipe, and distributed by branches to the several tenements; that one Frost was tenant at will of the room over the plaintiff's shop, and had agreed, in part payment for his rent, to pay the water rates for the whole block; but he had neglected to do this, and suffered the waste pipe from his sink to get clogged; that the water commissioners of the city of Boston had therefore cut off the supply of water from the block; that the defendant, being informed that one of the tenants wanted the water, went to the water commissioner, paid the rates, became responsible for them for the future, and directed the water to be let on, which was done; and that the faucet in Frost's room was left open, so that the water after filling the sink overflowed and soaked through the floor into the plaintiff's shop and damaged his property.

The defendant claimed that the action could not be maintained against him because he was an agent, acting within the scope of his authority. But the court ruled that his being an agent, in a case like the present, would not, in itself and standing alone, be a defense to this action.

The defendant then contended that an agent could not be held liable, when acting within the scope of his authority, for a mere nonfeasance—which he contended this was—nor for any negligence while acting within the scope of his authority. But the court ruled

that the direction to the water commissioners to let on the water, was not a nonfeasance but a positive act; and if it was done negligently and without the exercise of ordinary care, he would be liable for any injury occasioned by the want of ordinary care.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

METCALF, J. Our opinion is that the rule of the law, on which the defendant hopes to sustain these exceptions, is not applicable to this case. Assuming that he was a mere agent, yet the injury for which this action was brought was not caused by his nonfeasance but his misfeasance. Nonfeasance is the omission of an act which a person ought to do; misfeasance is the improper doing of an act which a person might lawfully do; and malfeasance is the doing of an act which a person ought not to do at all. 2 Inst. Cler. 107. 2 Dane Ab. 482. 1 Chit. Pl. (6th Amer. ed.) 151. 1 Chit. Gen. Pract. 9. The defendant's omission to examine the state of the pipes in the house, before causing the water to be let on was a nonfeasance. But if he had not caused the water to be let on, that nonfeasance would not have injured the plaintiff. If he had examined the pipes and left them in a proper condition, and then caused the letting on of the water there would have been neither nonfeasance nor misfeasance. As the facts are, the nonfeasance caused the act done to be misfeasance. But from which did the plaintiff suffer? Clearly from the act done, which was no less a misfeasance by reason of being preceded by a nonfeasance.

The instructions to the jury were sufficiently favorable to the defendant; and the jury under these circumstances must have found all the facts necessary to the maintenance of the action.

Exceptions overruled.

QUESTIONS

1. What instructions were given to the jury in the court below? What rule of law is involved in these instructions?
2. What was the wrong complained of in the principal case? Suppose that the action had been brought against the defendant's principal, what would have been the decision?
3. Suppose that in an action against the defendant's principal damages had been recovered, what would have been the principal's rights, if any, against the agent?
4. P owes a duty to passers-by to repair a bridge which is on his land. P directs A, his agent, to repair the bridge. A neglects to do so. T

sustains a personal injury as a result of the defective bridge. T brings an action against P for damages. What decision?

5. Suppose that T recovers damages from P, does P have any remedy against A?
6. T brings an action for damages against A, because of his failure to repair the bridge. What decision?
7. A, agent for P, while acting in the course of his employment, negligently injures T. What are T's rights?
8. A, while acting outside the scope of his employment, negligently injures T. (*a*) T sues A for damages. (*b*) T sues P for damages. What decision in each case?
9. A, while delivering groceries for P, deliberately runs over and injures T. (*a*) T sues P for damages. (*b*) T sues A for damages. What decision in each case?
10. What is a *nonfeasance?* A *misfeasance?* A *malfeasance?*

COLLEN *v.* WRIGHT

8 Ellis and Blackburn's Reports 647 (1857)

WILLES, J. It appears to me that the judgment of the Court of the Queen's Bench ought in all respects to be confirmed. I am of the opinion that a person, who induces another to contract with him as the agent of the third party by an unqualified assertion of his being authorized to act as an agent is answerable to the person who so contracts for any damages which he may sustain by reason of the assertion of the authority being untrue. This is not the case of a bare misstatement by a person not bound by any duty to give any information. The fact that the professed agent honestly thinks he has authority affects the moral character of the act, but his moral innocence, so far as the person whom he has induced to contract is concerned, in no way aids such person or alleviates the inconvenience and damage which he sustains. The obligation arising in such a case is well expressed by saying that a person professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract upon faith of the professed agent being duly authorized, that the authority which he professes to have does in point of fact exist. The fact of entering into the transaction with the professed agent, as such, is good consideration for the promise. Indeed the contract would be binding upon the person dealing with the professed agent if the alleged prin-

cipal were to ratify the act of the latter. This was, in effect, the view taken by the Court of the Queen's Bench, and to which I adhere.

With respect to the amount of damages, I retain the opinion thrown out in the course of argument, that all expenses sought to be recovered were occasioned by the assertion of authority made at the time of the contract being continued and persisted in by the defendant's testator and bona fide acted upon by the plaintiff. That assertion was never withdrawn, not even in the letter of April 11th, 1855, in answer to the plaintiff's notice to the defendant's testator, long after the proceedings in the Chancery had commenced and whilst they were in full progress. I am therefore of the opinion that the judgment of the Queen's Bench was right, and that it ought to be affirmed.

QUESTIONS

1. What was the nature of the relief sought by the plaintiff in the principal case? What rule of law is laid down by the principal case?
2. Was the action on the alleged contract which the defendant, as agent, thought he was making for his principal? What would have been the decision, in case the action had been against the agent on the alleged contract?
3. A states to T that he has authority to act for P. He makes the statement with knowledge of its falsity and with intent to deceive T. In reliance on the statement, T enters into an agreement with A to sell goods to P. P refuses to ratify the unauthorized agreement. What are T's rights, if any, against A?
4. A states to T that he has authority to act for P and honestly believes that he has. T relies on the statement and enters into an agreement with A to sell goods to P. P refuses to accept or pay for the goods when tendered by T. What are T's rights against A?
5. A enters into an agreement with T on behalf of P to buy goods from T. At the time of the transaction, nothing is said about the authority of A. As a matter of fact, A has no authority to represent P. P refuses to ratify the unauthorized agreement. What are T's rights against A?
6. P directs A to buy grain for him. A enters into an agreement with T to buy grain from him on P's account. Unknown to either T or A, P died a few minutes before the agreement was made. (*a*) T sues the estate of P for breach of the alleged contract. (*b*) T sues A in deceit for damages. (*c*) T sues A on an implied warranty of authority. What decision in each case?

RHOADES *v.* BLACKISTON

106 Massachusetts Reports 334 (1871)

Contract for breach of an agreement to sell and deliver coal. At the trial in this court, before COLT, J., the plaintiff testified that after the making of the alleged agreement, and its breach by the defendants, he was adjudged a bankrupt; "that he made the agreement while acting as agent of Alonzo V. Lynde, under authority from him, and made it as agent: that he owed Lynde a large sum of money, and had transferred his coal business to him as security for the debt: that it was agreed between them that Lynde was to furnish the capital, and was to receive all the profits of the business, except enough to support the plaintiff and his family, until the debt should be paid; that after the debt was paid the property was to be his, and the profits of the business; and that he had no property in the coal, or interest other than as stated, and his own money was not invested in the business; but that he was to have his living out of the business until the debt was paid."

The defendants objected that the plaintiff could not maintain the action, and the judge reported the case for the determination of the full court, if the court should be of opinion that the plaintiff could not maintain the action, judgment to be for the defendants, otherwise the case to stand for trial.

COLT, J. It is a well-established rule of law that when a contract not under seal, is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it. If the agent sues, it is no ground of defense that the beneficial interest is in another, or that the plaintiff, when he recovers, will be bound to account to another. There is an additional reason for giving this right to the agent, when he has a special interest in the subject-matter, or a lien upon it. But the rule prevails when the sole interest under the contract is in the principal. The agent's right is of course subordinate to and liable to the control of the principal, to the extent of his interest. He may supersede it by suing in his own name, or otherwise suspend or extinguish it, subject only to the special right or lien which the agent may have acquired.

In this case, the contract relied on was made by the plaintiff in his own name, as agent for an undisclosed principal, who does not now in any way interpose. But admitting the law of principal and agent as that stated, the defendants further contend that the plain-

tiff's right of action passed to his assignees in bankruptcy, who were appointed in proceedings commenced after the alleged breach. It appears that the plaintiff made the contract in the course of a business which he was carrying on for Alonzo V. Lynde, and which he had previously transferred to Lynde as security for a debt, with the agreement that after the debt was paid, the property was to be his with the profits of the business, Lynde furnishing all the capital and receiving all the profits, except enough for the support of the plaintiff and his family, until the debt should be paid. And it was claimed that upon these facts the plaintiff had such a legal and equitable interest in the contract that it must pass by the bankruptcy proceedings to the assignees.

Assignees in bankruptcy do not, like heirs and executors, take the whole legal title in the bankrupt's property. They take such estate only as the bankrupt had a beneficial as well as a legal interest in, and which is to be applied for the payment of his debts. To a plea that the plaintiff is a bankrupt and that all his estate is vested in his assignees, it is a good replication that the whole beneficial interest in the contract or demand in suit was vested by prior assignment in a third party, for whose benefit the suit is prosecuted. If however the bankrupt has any beneficial interest in the avails of the suit, then the whole legal title vests in his assignee, and the action must be in his name, for there cannot be two legal owners of one contract at the same time.

In most of the English cases in which these rules have been applied, there was an assignment of a chose in action by the bankrupt to a third party, made before the bankruptcy, and they have mainly turned on the question whether the transfer was absolute or only as security for debt, and if as security only, then further, on the question whether the security was of greater value than the debt secured, at the time of the bankruptcy.

The court is of the opinion that the rule in these cases, if ever applicable to a case where an agent sues upon a contract made in the course of his agency, where the suit is subject to the control of the principal, cannot be applied to defeat the plaintiff's action here. The pledged property consisted of a business to be carried on with the capital of the party to whom it was transferred. The contracts made in the course of it were contracts of the principal. The agent had no immediate beneficial interest in them. His interest was only in the future profits, and that contingent on their being sufficient to

pay the debt he owed. The contract of Lynde to restore the property to the plaintiff was executory, and there was no claim that the contingency had happened upon which the business and property were to become the plaintiff's. The inference from the facts reported is, that it did not. The support which he was to have for himself and his family was plainly in compensation for his agency in the business. And there is nothing to show that the creditors in bankruptcy have any valuable interest in the contract declared on. *Parnham* v. *Hurst*, M. & W. 743. *Ontario Bank* v. *Mumford*, 2 Barb. Ch. 596. 3 Parsons on Contracts, 479.

Case to stand for trial.

QUESTIONS

1. What issue or issues were under consideration in the principal case? How were they decided? What rules of law can be deduced from the decision?
2. What objections did the defendants urge against a recovery by the plaintiff?
3. Suppose that the plaintiff's principal had interposed and had forbidden him to bring this action, what would have been the decision of the court?
4. Suppose that the plaintiff's principal had already brought an action on the same cause of action against the defendants, what would have been the decision in this case?
5. Suppose that the plaintiff gets satisfaction of a judgment against the defendants, how will he hold the proceeds of the judgment?
6. A, acting for an undisclosed principal, enters into a contract with T to buy cotton. This is an action against A on the contract. What decision?
7. A enters into a contract with T to buy cotton. A informs T that he is acting for an undisclosed principal but does not state who his principal is. T sues A on the contract. What decision?
8. In the foregoing case, T learns that the contract was made for P and demands performance of him. P refuses to perform and T brings an action on the contract against A. What decision?
9. T brings an action against P and recovers a judgment on which he is unable to realize anything. He thereupon brings an action against A on the same contract. What decision?
10. A negotiates with T for the purchase of goods on credit for P. T says: "I know nothing of P, but I will sell the goods to him if you will vouch for him." A says that he will vouch for him and the bargain is made. T debits A on his books for the amount with the knowledge of A. Later he brings an action against A. What decision?

HOBSON *v.* HASSETT

76 California Reports 203 (1888)

BELCHER, C. C. This action was brought to recover the amount due on a promissory note which reads as follows:—

"September 7, 1881.

"$1,135. One day after date, without grace, we promise to pay A. D. Hobson or order the sum of $1,135, payable only in gold coin of the government of the United States, with interest thereon in like gold coin, at the rate of 10% per year from date until paid.

A. HASSETT, President."

The court found that prior to the year 1878, the Grangers' Business Association of Healdsburg was duly organized as a corporation, and has existed as such ever since; that on the eighth day of January 1878, the said corporation became indebted to the plaintiff in the sum of two thousand dollars, and that on that date made and delivered its promissory note to plaintiff for that amount; that on the seventh day of September, 1881, plaintiff presented this note to one Barge, who was bookkeeper and accountant of the corporation, for payment, and requested that the corporation give him nine hundred dollars in cash, and give him a new note for the balance; that defendant Hassett was president of the corporation at that time; that Barge paid the nine hundred dollars, and drew a note for the balance, and requested defendant, as president of the corporation, to sign it, which defendant intended to do, but signed only his own name, adding thereto the word "president"; that the note so executed is the note set out in the complaint; that defendant and Barge intended to make and deliver the note of the corporation, and did not then or at any other time say or do anything to lead plaintiff to believe that the defendant intended to make or deliver his own note, and not the note of the corporation; that plaintiff could not read writing, and did not know at the time in what manner the note was executed, but at the end of every month for eighteen months thereafter, he presented it, and received from the corporation the interest due thereon, and never claimed or demanded from the defendant the payment thereof prior to the bringing of this action.

Upon these facts the court found, as a conclusion of law, that the note was the note of the defendant and not of the corporation, and

thereupon judgment was entered in favor of the plaintiff. The defendant appealed, and the case comes here on the judgment roll.

The principal contention of the appellant is, that the note was the note of the corporation, and not of the defendant, and that the court erred in its conclusion of law to the contrary.

In the large number of adjudicated cases, it is sometimes difficult to determine whether a note or bill of exchange, drawn by an agent, but for the use and benefit of the principal, binds the agent personally or not. There are, however, some general rules upon the subject, which seem to be well settled. JUDGE STORY says: "When, upon the face of the instrument, the agent signs his own name only without referring to any principal, then he will be personally bound, although he is known to be or outwardly acts as an agent." (Story on Promissory Notes, Sec. 68). But, "if it can, upon the whole instrument, be collected that the true object and intent of it are to bind the principal, and not to bind the agent, courts of justice will adopt that construction of it, however informally it may be expressed." (Sec .69.)

Professor Parsons says: "If an agent makes a note in his own name, and adds to his signature the word 'agent,' but there is nothing on the note to indicate who the principal is, the agent will be personally liable, just as if the word 'agent' were not added." (1 Parsons on Notes and Bills, p. 95.) And "one who puts his name on negotiable paper will be held personally liable, as we have seen, although he acts as agent, unless he says so, and says also who his principal is; that is, unless he uses some expression equivalent, to use Lord Ellenborough's language, to 'I am the mere scribe.' For if the construction may fairly be that while he acts officially, or at the request of others, yet what he does is still his own act, it will be so interpreted."

The cases cited by appellant are not in conflict with the rules stated above. In *Farmers' and Mechanics' Bank* v. *Colby*, 64 Cal. 352, the note was signed by "G. A. Colby, Pres. Pac. Peat Coal Co., D. K. Tripp, Sec. pro. tem." It was indorsed by Colby and four others. The action was against Colby and Tripp as makers, and the other defendants as indorsers. The court said: "Read as a whole, we think it apparent from its face that it is the note of the company endorsed by individuals."

In *Bean* v. *Pioneer Mining Co.*, 66 Calif. 451, 56 Am. Rep. 106, the note was signed "Pioneer Mining Company, John E. Mason, Supt." The plaintiff sought to hold Mason personally responsible on the note, but the court considered him not to be bound. The court said:

"The signature is not 'John E. Mason, Superintendent of the Pioneer Mining Company,' the last portion of which, in the absence of any words in the body of the note indicating any intention that it should be an obligation of the company, might, it is claimed, be held to be merely *descriptio personae*. But here the words, 'Pioneer Mining Company' precede the name 'John E. Mason.'"

In *Mechanics' Bank of Alexandria* v. *Bank of Columbia*, 5 Wheat. 326, the question was, whether a certain act done by the cashier of a bank was done in his official or individual capacity. The action was based upon a check, and the court said: "But the fact that this appears on its face to be a private check is by no means to be conceded. On the contrary, the appearance of the corporate name of the institution on the face of the paper at once leads to the belief that it is a corporate and not an individual transaction; to which must be added the circumstance that the cashier is the drawer, and the teller payee; and the form of ordinary checks deviated from by the substitution of 'to order' or 'to bearer.' The evidence, therefore, in the face of the bill, predominates on favor of its being a bank transaction."

In *Carpenter* v. *Farnsworth*, 106 Mass. 561, 8 Am. Rep. 360, the action was on a check, having the words "Aetna Mills" printed on the margin, and signed "J. D. Farnsworth, Treasurer." The court said "that this check manifests upon its face that the writing is the act of the principal, though done by the hand of an agent; or, in other words, that it is the check of the Aetna Mills, executed by Farnsworth as the treasurer and in their behalf."

In the light of the rules of law pronounced above, the question then is, Did the defendant make himself personally responsible for its payment? It seems to us that there can be but one answer to this question, and that is, that he did. There is nothing on the face of the note to show that there was any principal back of the defendant. He signed his own name, and wholly failed to indicate, if he had a principal, who or what the principal was. The word "president" which he added to his name must, therefore, be regarded as a mere *descriptio personae*.

We think the court drew correct conclusions from the facts before it, and, therefore, advise that the judgment be affirmed.

QUESTIONS

1. What rule of law does the principal case lay down? Does this rule seem just to the defendant as agent of the corporation?

2. Does it follow from the decision that the defendant will have to bear the judgment personally?
3. Suppose that the writing in the principal case, which the defendant signed, had been a contract to buy goods, would the decision of the court have been the same?
4. A, acting for an undisclosed principal, executes and delivers to T, the following instrument: "Thirty days after date, I promise to pay to T or order the sum of two hundred and fifty dollars, with legal rate of interest. (Signed.) A." (*a*) T sues P on the note. (*b*) T sues A on the note. What decision in each case?
5. T sues A on the following note: "Thirty days from date, I promise to pay T or order the sum of $250 with legal rate of interest. (Signed.) A, Agent." A contends that he is not liable because, as he proves at the trial, T knew that he was acting for P in the execution of the note. What decision?
6. In the foregoing case, the note is signed: "A, Agent of P." What decision in an action by T against A on the note?
7. The note is signed: "A, Agent for P." What decision in an action by T against A?
8. The note is signed as follows: "P, by his agent, A." What decision in an action by T against A?
9. This was an action by the plaintiff against Brown on a check signed in this manner: "J. W. Brown, Treasurer." On the margin of the check these words were printed: "Alabama Gin Company." The defendant contended that he was not liable on the instrument because it was executed on behalf of his principal, Alabama Gin Company. What decision?
10. T sues A on the following contract: "In consideration of T's promise to sell, I agree to buy Blackacre and to pay him $10,000 therefor." (Signed.) A." A contends that he is not liable on the contract because, as he proves, T knew that he was acting as agent for P. What decision?

4. Termination of the Relation

BROOKSHIRE *v.* BROOKSHIRE

8 Iredell's North Carolina Law Reports 74 (1847)

NASH, J. It is not denied by the plaintiff that, in this case, it was within the power of the defendant to put an end to his agency, by revoking his authority. Indeed, this is a doctrine so consonant with justice and common sense that it requires no reasoning to prove it. But he contends that it is a maxim of the common law, that every instrument must be revoked by one of equal dignity. It is true that an

instrument under seal cannot be released or discharged by an instrument not under seal or by parol; but we do not consider the rule as applicable to the revocation of powers of attorney, especially to such a one as we are now considering. The authority of an agent is conferred at the mere will of his principal and is to be executed for his benefit; the principal, therefore, has a right to put an end to the agency whenever he pleases, and the agent has no right to insist upon acting, when the confidence at first reposed in him is withdrawn. In this case, it was not necessary to enable the plaintiff to execute his agency, that his power should be under seal; one by parol, or by writing of any kind, would have been sufficient; it certainly cannot require more form to revoke the power than to create it. Mr. Story, in his treatise on Agency, page 606, lays it down that the revocation of a power may be, by a direct and formal declaration publicly made known, or by an informal writing, or by parol; or it may be implied from circumstances, and he nowhere intimates, nor do any of the authorities we have looked into, that when the power is created by deed, it must be revoked by deed. And, as was before remarked, the nature of the relation between the principal and the agent seems to be at war with such a principle. It is stated by Mr. Story, in the same page, that an agency may be revoked by implication, and all the text-writers lay down the same doctrine. Thus, if another agent is appointed to execute powers, previously intrusted to some other person, it is a revocation in general, of the power of the latter. For this proposition, Mr. Story cites *Copeland* v. *The Mercantile Insurance Company*, 6 Pick. 198. In that case, it was decided that a power, given to one Pedrick to sell the interest of his principal in a vessel, was revoked by a subsequent letter of instruction to him and the master to sell. As then, an agent may be appointed by parol, and as the appointment of a subsequent agent supersedes and revokes the powers previously granted to another, it follows, that the power of the latter, though created by deed, may be revoked by the principal, by parol. But the case in Pickering goes farther. The case does not state, in so many words, that the power granted to Pedrick was under seal, but the facts set forth in the case show that was the fact; and, if so, is a direct authority in this case. This is the only point raised, in the plaintiff's bill of exceptions, as to the judge's charge.

QUESTIONS

1. P grants authority to A under seal to sell Blackacre. Later, P notifies A by word of mouth that his authority to sell the land is revoked. Nevertheless, A executes and delivers to T a deed to the land. (*a*) A sues P for compensation for his services. (*b*) T sues P for possession of Blackacre. What decision in each case?
2. P grants A authority in writing to sell goods for him. P by word of mouth notifies A not to sell the goods. A, however, contracts to sell the goods to T. (*a*) A sues P for commissions on the sale. (*b*) T sues P for his refusal to deliver possession of the goods. What decision in each case?
3. While A is seeking a purchaser for Blackacre, P sells the land to T. A, with knowledge of the sale by P, executes and delivers a deed of conveyance to X. (*a*) What are the rights of A? (*b*) What are the rights of X?
4. P authorizes A to sell five horses for him. A sells the horses to X. Later, A sells two other horses to T. T sues P for possession of the horses. P contends that T cannot recover because A had no authority to make the second sale. What decision?
5. P appoints A as agent to sell goods for him for a period of six months. After the six months have elapsed, A enters into a contract to sell goods for P to T. T sues P for his refusal to deliver the goods. What decision?
6. P says to A: "If you will sell my goods, I will pay you a commission on your sales." A makes preparations to sell P's goods. P notifies him that his authority to sell is withdrawn. A sues P for damages. What decision?
7. A leaves P and begins to sell goods for a rival. P sues A for damages. What decision?
8. P says to A: "If you will promise to sell goods for me for a period of six months, I will pay you $300 a month for your services." A makes the promise requested. At the end of two months, P withdraws A's authority to sell. What are A's rights under the circumstances?
9. A, after making the promise to sell for P, begins to sell for a rival. P sues A for damages. What decision?
10. What is the effect of death of the principal on the relation? Death of the agent?
11. What effect does insanity of the principal have? Insanity of the agent?
12. What is the effect of bankruptcy of the principal? Bankruptcy of the agent?

CHAMBERS v. SEAY

73 Alabama Reports 372 (1882)

This was an action by George W. Chambers against John L. Seay; was founded on a contract executed by and between the parties, the material terms of which are stated in the opinion.

There was a judgment for the defendant on verdict, in the circuit court, from which the plaintiff appealed. The other facts necessary to an understanding of the points decided and the errors here assigned are sufficiently indicated in the opinion.

SOMERVILLE, J The main contention in this case involves the right of the principal to revoke the agent's authority to sell, so as to deprive the latter of his commissions.

The agreement, which is the basis of this suit, is in writing, bearing date February 28, 1878, and is signed by both the plaintiff and the defendant. Its substance is briefly as follows: Seay was the owner of a tract of land in Talladega county, valuable for the quantity of iron ore it was known to contain. He placed this land in the hands of Chambers for sale, subject to Seay's ratification, if he (Seay) should "deem the price to be paid for said property sufficient to warrant a sale." Chambers, on his part, agreed to undertake the sale of the land, and to this end undertook and promised to transport specimens of ore taken from it to Birmingham, England, for inspection there; and also to advertise the property in one respectable paper in each of the cities of Birmingham and London, England. By way of compensation for his services and expenses, it was stipulated that Chambers should receive "an undivided one-fourth interest in *the proceeds of sale* when sold as aforesaid," and his right to sell was made "exclusive."

The evidence tends to show that Seay revoked the agency of Chambers in January, 1880, and very soon afterward himself sold the property to one Glidden for the sum of twenty thousand dollars. The circuit court charged the jury, that the agreement in question was a mere *revocable* agency, which could be recalled by the principal, Seay, at any time before it had been executed, by his making a sale of the property; and if it was so revoked prior to the sale made by Seay to Glidden, then Chambers was not entitled to recover any commissions.

The rule is not denied, that, in ordinary cases, a principal, who has empowered an agent to sell, may at any time before sale revoke

the agent's authority. It is equally true that the usual theory of commissions is, that the agent is to receive them only in the event of success. Wood's Mayne on Damages (Amer. Ed.), sec. 746-47.

It is argued that the present agreement does not come within this general rule, because it confers on the agent a power coupled with an interest, and that such a power is irrevocable. It is a generally admitted proposition of law, that a principal is not permitted to revoke the authority of his agent, where such authority is *coupled with an interest*, or where it is *necessary to effectuate a security*. Ewell's Evans on Agency, marg. page 83. These are the two established exceptions, which seem, indeed, to be essentially similar in principle. It is contended that the agency of the plaintiff, Chambers, comes within the influence of the first exception, as being coupled with an interest, and it is not competent, therefore, for Seay to revoke it. It is not any interest, however, that will suffice to render an agency irrevocable. An interest in the proceeds of sale, or money derived from the sale of property by an agent, is not sufficient for this purpose. *Barr* v. *Schroeder*, 32 Cal. 609; Hartley's Appeal, 3 Penn. St. 212; *Gilbert* v. *Holmes*, 64 Ill. 549. To be irrevocable, it seems now well settled that the power conferred must create an interest in the thing itself, or in the property which is the subject of the power. In other words, "the power and estate must be united and co-existent," and, possibly, of such a nature that the power would survive the principal in the event of the latter's death, so as to be capable of execution in the name of the agent. *Blackstone* v. *Buttermore*, 53 Penn. St. 266; *Bonney* v. *Smith*, 17 Ill. 531; *Mansfield* v. *Mansfield*, 6 Conn. 559; *Hunt* v. *Rousmanier*, 8 Wheat. U.S. 174; *Raleigh* v. *Atkinson*, 6 M. & W. 670. In *Hunt* v. *Rousmanier*, *supra*, such a power was defined by CHIEF JUSTICE MARSHALL to be one "engrafted on an estate in the thing itself."

The power conferred on Chambers was not of this nature very clearly. He had no interest in the subject-matter of his agency, the land itself. He was interested only in the money to be derived as the proceeds of the sale of the land, which could only be realized by the completion of his agency or by some negotiation which was tantamount to it. He had parted with no money, or other value, for the security of which the power of sale was conferred in the agreement. He had risked in the venture of his agency only his personal services and the expenses incidental to its execution. The undertaking to

transport specimens of iron ore to England, and to advertise the lands there, may be embraced as a part of the ordinary expense to be incurred in the usual course of such an employment. It is fair to presume that he risked this much in view of the large compensation to be reaped as commissions, in the event of a successful sale. *Simpson* v. *Lamb*, 17 C. B. 603.

It is insisted further that the agency is rendered irrevocable by reason of the fact that the power of sale conferred on Chambers was stipulated to be *exclusive*. This cannot be stronger than the use of the word "irrevocable" which has been construed to fail of such a person, unless the agency comes with the exceptions discussed above. In the case of a naked power, an express declaration of irrevocability will not prevent revocation. *McGregor* v. *Gardner*, 17 Iowa, 326; *Blackstone* v. *Buttermore*, 53 Penn. St. 266.

The chief difficulty arises in those cases where the agent has incurred trouble and expense in the execution of his agency, and has been prevented from effecting a sale by the interference of his principal, whether by revocation of his authority, or otherwise. It is not just, it is true, for a principal to revoke an agent's authority without paying him for labor and expense reasonably incurred in the course of the agent's employment. Unless otherwise stipulated, the agent may, in a proper form of action, ordinarily claim reimbursement for the value of these. Evans' Agency (Ewell), marg. p. 83-84. So where a sale of property is brought about by the advertisements or exertions of a broker or agent, the broker being the efficient instrumentality, he may often recover his commissions. *Sussdorff* v. *Schmidt*. 55 N.Y. 319; *Earp* v. *Cummins*, 54 Penn. St. 394. These are mentioned as just qualifications of the general rule, to which we have adverted above, touching the subject of the revocation of an agent's authority by his principal.

The pleadings in the present case, upon which it was tried, are framed very clearly with reference to a recovery of the stipulated commissions promised to Chambers, and the gravamen of the action is, in effect, alleged to be the wrongful revocation of the agency by act of the principal. We need not, for this reason, discuss the question, as to the plaintiff's right to recover for the value of his services, or for expenses incurred. The first and fifth counts were obviously actions on the case, and the other counts were in *assumpsit*. *Myers* v. *Gilbert*, 18 Ala. 467. The demurrer for misjoinder was consequently well taken, and was properly sustained by the court.

The rulings of the circuit court were in accordance with the foregoing views, and its judgment must be affirmed.

QUESTIONS

1. What issue was under consideration in the principal case? How was it decided? What rule of law can be deduced from the decision?
2. Do you conclude from the decision in this case that the plaintiff is entitled to no compensation for his services and no reimbursement for the money which he expended?
3. P engaged A to sell cotton for him for a year, with the understanding that A might deduct from the proceeds of his sales money by way of compensation for his services. Before the end of the year, P notified A that his authority was withdrawn. What are the rights of A under the circumstances?
4. P in writing authorizes A to sell Blackacre and to deduct from the proceeds of the sale compensation for his services. It is stated in the appointment that "this power is irrevocable either during my life or after my death." (*a*) Before A has effected a sale, P notifies him that his authority is withdrawn. (*b*) Before a sale is effected, P dies. What are the rights of A under each hypothesis?
5. P borrowed $5,000 from A. By way of security, P executed a mortgage on certain land to A, in which he granted A power to sell and collect his debt from the proceeds of the sale in the event that the debt was not paid at its maturity. A was proceeding to exercise the power, when he received notice from P that the authority to sell was withdrawn. Nevertheless, A sold the property to T. T sues P for possession of the property. What decision?
6. In the foregoing case, P died just before A exercised the power. A, however, sold the property to T. What are the rights of T under the circumstances?
7. P owed A $500. By way of security, P gave A a power of attorney to sell and deliver an automobile and to collect his debt from the proceeds of the sale. (*a*) P notified A that the authority to sell was withdrawn. (*b*) P died before the power was exercised. What are the rights of A under each hypothesis?
8. P assigned a lease to A and granted him power to collect rents from the lessee to secure repayment of a debt which P owed to A. Can P revoke this authority during his life? Is the authority revoked by P's death?
9. P appointed A agent to sell goods for him. He authorized A to deduct from the proceeds of his sales money not only by way of compensation but also by way of reimbursement for $500 which A previously advanced to P. Can P revoke this authority during his life? Is this authority revoked by P's death?

CLAFLIN *v.* LENHEIM

66 New York Reports 301 (1876)

Appeal from the judgment of the General Term of the Supreme Court in the first judicial department affirming a judgment in favor of the defendant entered upon a verdict, and denying a motion for a new trial.

RAPALLO, J. The plaintiffs seek to recover in this action the price of certain merchandise which they allege they sold and delivered to the defendant, through his brother, H. S. Lenheim, as his agent.

To establish the agency, they proved that this brother of the defendant had, for several years prior to July, 1867, conducted the business of a store at Meadville, Pennsylvania, in the name of the defendant, and had been in the habit of purchasing goods for that store from the plaintiffs. These purchases were all made in the name and on the credit of the defendant and the bills thereto were rendered to and paid by him.

The defendant concedes in his testimony that previous to a fire that took place in July, 1867, in the store at Meadville, his brother was authorized by him to make purchases and carry on that store in his, the defendant's, name, but contends that after the fire he terminated such authority. The purchases for which this action was brought were made by the brother, for the Meadville store, in November and December, 1869, in the name of the defendant. The plaintiff claims that they had no notice of the revocation of the agency, and sold on the credit of the defendant.

The last bill paid by the defendant for goods sold for the Meadville store, was for upward of $8,000, and was paid in August, 1867. It was for goods sold before the fire. There was a difficulty between the plaintiffs and the defendant, and he was required to pay the costs of these proceedings, which he did in August, 1867. The defendant had for several years previously carried on another store at Great Bend, Pennsylvania, and had been in the habit of purchasing goods from the plaintiffs for that store; but after this difficulty he suspended all dealings with the plaintiffs until the month of October, 1869, when he resumed his business relations with them by purchasing goods, personally, for the store at Great Bend. In the following months of November and December, 1869, the brother made the purchases now in controversy, in the name of the defendant, for the Meadville store.

The defendant gave evidence on the trial tending to show actual notice to the plaintiffs of the revocation of the agency after the fire of July, 1867. It was conceded that the plaintiffs had the notice of the burning of the store at Meadville, but the evidence of notice of the revocation of the agency was controverted.

The court submitted to the jury the question whether the plaintiffs had notice of the revocation, but charged that if the jury came to the conclusion "that the circumstances of the case were such, independently of the question of notice, that in fair dealing between man and man plaintiffs should have inquired by telegraph or letter of the defendant at Great Bend whether he continued the Meadville store and whether the brother continued to have authority to buy goods in his name, that will end the recovery in this case"; and further, that if the jury come to the conclusion "that no notice in fact was given and that the circumstances were such as to put the plaintiffs fairly upon inquiry as to whether that business was continued by the defendant and the brother had authority to continue it by making these purchases, that ends the responsibility on the part of the defendant." Exceptions were duly taken to portions of the charge quoted above.

It is a familiar principle of law that when one has constituted and accredited another agent to carry on a business, the authority of the agent to bind his principal continues, even after an actual revocation is given; and, as to persons who have been accustomed to deal with such agent, until notice of the revocation has been brought home to them. The case of such an agency is analogous to that of a partnership, and the notice of the revocation of an agency is governed by the same rules as notice of the dissolution of a partnership. As to persons who have been previously in the habit of dealing with the firm, it is requisite that actual notice should be brought home to the creditor or at least that the credit should have been given under circumstances from which notice can be inferred. Where the circumstances are controverted, or where notice is sought to be inferred as a fact, from circumstances, the question is for the jury; they must determine, as a question of fact, whether the party claiming against the partnership or the principal, did have notice of the dissolution or revocation; and there being some evidence of the fact of notice, the court, in the present case, properly submitted to the jury this question of fact.

The court submitted to the jury this further question whether, independently of the question of notice in fact, the circumstances were such as to put the plaintiffs on inquiry as to whether the authority of the agent continued, and charged them that if they were, the plaintiffs were charged with notice of the facts which the inquiry would have disclosed. In other words, the question was submitted to the jury whether, although the plaintiffs had no notice in fact, they had constructive notice of the revocation of the agency.

We think that the circumstances existing at the time of the sale of the goods in question were not sufficient to constitute constructive notice of the revocation of the agency, and that the case should have been submitted to the jury only upon the question of the notice in fact. In this there is no hardship upon the defendant; it was his duty, after he had accredited his brother for a series of years as authorized to deal in his name and on his responsibility, when he terminated that authority, to notify all parties who had been in the habit of dealing with his agent, as the plaintiffs had been to his knowledge. This was an act easily performed and would have been a perfect protection to him and prevented the plaintiffs from being deceived. Justice to parties dealing with agents requires that the rule requiring notice in such cases should not be departed from on slight grounds or dubious or equivocal circumstances substituted in the place of notice. If notice was not in fact given, and loss happens to the defendant, it is attributable to his neglect of a most useful and necessary precaution.

The jury may have been satisfied that notice was given, but under the charge they may have rendered their verdict solely on the ground of constructive notice; the judgment must therefore, be reversed and a new trial ordered, with costs to abide the events.

Judgment reversed.

QUESTIONS

1. What instructions were given to the jury by the trial court? What error did the court commit in these instructions? What instructions should it have given?
2. Why, in the opinion of this court, should a person, in any event, be under a duty of giving notice of the termination of his agent's authority?
3. Suppose that the plaintiffs had heard indirectly that the defendant had revoked the authority of his brother to buy for him, what would have been the decision in this case?

4. Suppose that the plaintiffs had heard rumors that the defendant had revoked the authority of his brother, what would have been the decision?
5. What is meant by *constructive* notice? Under what circumstances is constructive notice of the termination of an agent's authority sufficient?
6. For several years A had acted as agent of P. P published a notice of the termination of the relation in a newspaper. T, who had known of the relation but who had never dealt with P through A, sold goods to A for P on credit, in ignorance of the published notice. T sues P for his refusal to accept and pay for the goods. What decision?
7. T had dealt with A frequently as the agent of P. After the publication of the notice, but in ignorance of it, T sold goods to A on credit for P. A absconded with the goods. T sues P for the price of the goods. What decision?
8. P authorizes A to perform one specific act, the sale of Blackacre. When does the relation of principal and agent between them terminate? Is notice of its termination to anyone necessary?
9. P appoints A to act for him as a salesman for one year. When does the relation of agency end? Is notice of its termination to anyone necessary?
10. P appoints A to act for him as a salesman for a year. Before the end of the year, P dies. When does the agency come to an end? Is notice of its termination to anyone necessary?
11. When an agent dies, is notice of the termination of the agency necessary?

CHAPTER VI

PRIVATE PROPERTY

1. Introductory Topics

A

Nothing is more basic in the organization of our present economic society than the institution of private property. That individuals may acquire a private ownership in property and enjoy it in relatively absolute ways is one of the fundamental hypotheses of this society. It is not material in this connection to inquire whether private ownership in property should be recognized but it is material to be aware that such ownership exists and is sanctioned.

The institution of private property is an important organizing force in our society. The recognition of a private ownership in property stimulates and increases economic activities. Private ownership is the premium or reward which society offers to its members for the part which they play in its activities. Moreover, private property, implying, as it does, the transferability of the possession, use, and ownership of property, is the chief subject-matter in which the business world deals. This society is a co-operative-exchange society and private property is the *res* in terms of which this co-operative exchange takes place.

In view of the foregoing considerations it would seem to be a necessary part of the education of the business student that he should have some appreciation and understanding of the institution of private property, one of the fundamental hypotheses of the economic society in which he will carry on his business. This institution is a very important part of his social environment and he can no more afford to ignore his social environment than he can afford to ignore his physical environment.

But an adequate appreciation of private property as an institution in our society cannot be secured without some understanding of the law relating to it. The purpose of this course is, therefore, to give to the student some fundamental concepts of the law of private property.

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LAW AND BUSINESS

The content of the law relating to property is far too comprehensive for anything like an exhaustive study of it in this connection; and, indeed, such a study for the student does not seem at all necessary. Our study will, therefore, in the main, be confined to two fundamental notions of the law with respect to property. In the first place, an attempt will be made to develop something of the notion of ownership in property. What is the nature of ownership? What is the difference between possession of property and ownership in it? What qualities and characteristics does property, as recognized by law, possess which make it useful in the performance of its functions in our economic society?

In the second place, an attempt will be made to develop the notion of transferability of property. This notion is important because property without the quality of transferability could not perform well its functions in society as it is organized. To what extent is the quality of transferability extended by law to the various forms of property? Why is it that some forms of property possess this quality in higher degrees than other forms?

Private property is usually classified as real and personal. The distinction between the two is discussed in a later connection. The law pertaining to personal property is on the whole simple and non-technical in character. This is true because personal property, from relatively early times being more important as the subject-matter of trade and commerce, developed its characteristic of simplicity in response to the needs of business. Real property is not, however, primarily the subject-matter of business and has never been. In its early development it was essentially a military or a family institution; and it is only within comparatively recent times that it has come to play an important part in trade and commerce. Consequently, the law of real property developed much more slowly and in a rather tortuous way, and is at the present time still highly technical and full of historical survivals.

B[1]

With regard to their several sorts or kinds, things are usually said to consist in lands, tenements, or hereditaments. Land comprehends all things of a permanent nature; being a word of a very extensive signification, as will presently appear more at large. Tenements is a word of still greater extent though in its vulgar acceptation is only

[1] 2 Blackstone, *Commentaries on the Laws of England*, pp. 16–19.

applied to houses and other buildings, yet in its original, proper, and legal sense it signifies everything that may be holden, provided it be of a permanent nature, whether it be of a substantial and sensible or of an unsubstantial, ideal kind.

But an hereditament, says Sir Edward Coke, is by much the largest and most comprehensive expression, for it includes not only land and tenements, but whatsoever may be inherited, be it corporeal or incorporeal, real, personal, or mixed. Thus an heirloom, or implement of furniture which by custom descends to the heir together with a house, is neither land nor tenement, but a mere movable; yet, being inheritable, is comprised under the general word "hereditament"; and so a condition, the benefit of which may descend to a man from his ancestor, is also an hereditament.

Hereditaments, then, to use the largest expression, are of two kinds: corporeal and incorporeal. Corporeal consist of such as affect the senses; such as may be seen and handled by the body; incorporeal are not the object of sensation, can neither be seen nor handled; are creatures of the mind and exist only in contemplation.

Corporeal hereditaments consist wholly of substantial and permanent objects, all of which may be comprehended under the general denomination of land only. For land, says Sir Edward Coke, comprehends in its legal signification any ground, soil, or earth whatsoever: as arable meadows, pastures, woods, moors, waters, marble furzes, and heath. It legally includeth all castles, houses and other buildings; for they consist, saith he, of two things: land, which is the foundation, and structures thereon; so that if I convey the land or ground, the structure or building passeth therewith. It is observable that water is here mentioned as a specie of land, which may seem a kind of solecism; but such is the language of the law; and, therefore, I cannot bring an action to recover possession of a piece of water, by the name of the water, only; either by calculating its capacity, as, for so many cubic yards, or by superficial measure, as for twenty acres of water; or by general description, as for a pond, a water course, or a rivulet; but I must bring my action for the land that lies at the bottom, and call it twenty acres of *land covered with water*.

Land hath also in its legal signification, an indefinite extent upwards, as well as downwards. *Cuius est solum, eius est usque ad coelum*, is the maxim of the law; therefore no man may erect any building, or the like to overhand another's land; and downwards,

whatever is in direct line between the surface of any land and the center of the earth, belongs to the owner of the surface: as in every day's experience in the mining countries. So that the word "land" includes not only the face of the earth, but everything under it or over it. And therefore if a man grants all his lands, he grants all his mines of metal and other fossils, his woods, his water, and his houses, as well as his fields and meadows.

C[1]

Under the name of things personal are included all sorts of things movable which may attend a man's person whereever he goes; and therefore being only the object of the law while they remain within the limits of its jurisdiction, and being also of a perishable quality, are not esteemed of so high a nature, nor paid so much regard to by the law, as lands and houses, and the profits issuing thereout. These being constantly within the reach and under the protection of the law, were the principal favorites of our first legislators, who took all imaginable care in ascertaining the rights and directing the disposition of such property as they imagined to be lasting and which would answer to posterity the trouble and pains that their ancestors employed about them; but at the same time entertained a very low and contemptuous opinion of all personal estate, which they regarded only as a transient commodity. The amount of it indeed was, comparatively, very trifling, during the scarcity of money and the ignorance of luxurious refinement which prevailed during the feudal ages. Hence it was that a tax of the fifteenth, tenth, or sometimes a much larger portion of all the movables of the subject was frequently laid without scruple, and is mentioned with much unconcern by ancient historians, though it would now justly alarm our opulent merchants and stockholders.

But of later years, since the introduction and extension of trade and commerce, which are entirely occupied in this species of property, and have greatly augmented its quality and of course its value, we have learned to conceive different ideas of it. Our courts now regard a man's personality in a light nearly, if not quite, equal to his realty; and have adopted a more enlarged and less technical mode of considering the one than the other; frequently drawn from the rules which they found already established by the Roman law, wherever those rules appeared to be well grounded and opposite to the case in question,

[1] 2 Blackstone, *op. cit.*, pp. 384–88.

but principally from reason and convenience, adopted to the circumstances of the times; preserving withal a due regard to ancient usage and a certain feudal tincture which is still to be found in some branches of personal property.

But things personal by our law do not only include things movable but also something more: the whole of which is comprehended under the general name of chattels, which Sir Edward Coke says is a French word, signifying goods. The appellation is in truth derived from the technical Latin word *catalla*, which primarily signified only beasts of husbandry, or (as we still call them) cattle, but in its secondary sense was applied to all movables in general.

Chattels, therefore, are distributed by law into two kinds: *chattels real* and *chattels personal*. Chattels real, saith Sir Edward Coke, are such as concern or savor of the realty, as terms for years of land; and these we call real chattels as being interests issuing out of it, or annexed to real estate, of which they have one quality, viz., immobility, which denominates them real; but want the other, viz., a sufficient legal, indeterminate duration; and this want it is that constitutes them chattels. The utmost period for which they can last is fixed and determinate, either for such a space of time certain, or till such a particular sum of money is raised out of such a particular income; so that they are not equal in the eyes of the law to the lowest estate of freehold, a lease for another's life.

Chattels personal are properly and strictly things movable which may be annexed to or attendant on the person of the owner, and carried about with him from one part of the world to another. Such are animals, household stuff, money, jewels, corn, garments, and everything else that can properly be put in motion, and transferred from place to place. And of this kind of chattels it is that we are principally to speak in the remainder of this book; having been unavoidably led to consider the nature of chattels real and their incidents in the former chapters which were employed upon real estate; that kind of property being of a mongrel, amphibious nature, originally endowed with only one of the characteristics of each species of things: the immobility of things real and the precarious duration of things personal.

Chattel interests being thus distinguished and distributed, it will be proper to consider, first, the nature of that property or dominion to which they are liable which must be principally, nay solely, referred to personal chattels; and secondly, the title to that property, or how it may be lost and acquired.

D

Personal property rights may be classified also as tangible and intangible, depending upon whether the subject-matter of ownership in a given case is corporeal or incorporeal. Tangible personal property is, as its name implies, made up of ownership in things which have a body and which can be seen, touched, and dealt with as physical objects in the external world, such as horses, clothes, and money. An article of personal property of this kind is sometimes called a *chose in possession*, or a thing in possession. Intangible personal property, on the other hand, consists of rights in the abstract without relation to any specific physical objects in the external world. A owes B $100; at the moment A may have no money with which to pay the debt, yet B has a claim against him for that amount; this claim is an intangible form of personal property. A owns a share of stock in a corporation; he has no interest in any specific property of the corporation, but he does have an intangible claim against the corporation which is classed as personal property. A enters into a contract to serve B for a year in consideration of B's promise to pay for the services; under this contract each has claims against the other; the claims which each has against the other are in the nature of intangible personal property. Personal property rights which have been called intangible are sometimes referred to as *choses in action*, things in action, in contrast with *choses in possession*. The latter means ownership in a physical object; the former means a power to convert an intangible claim against another into a *chose in possession* by judicial proceedings.

QUESTIONS

1. What is the economic significance of the institution of private property?
2. What is meant when it is said that the institution of private property is an organizing force in society?
3. Show, by illustrations, how "the institution of private property prevents acts economically destructive; makes it to the interests of various persons to perform productive operations; obliges persons to co-operate; establishes an institutional system that encourages co-operation; and enables world-wide co-operation to take place."
4. Draw up a list of the advantages of private property. Draw up a list of the disadvantages of private property. What, in your opinion, is the ultimate justification for the institution of private property, if it can be justified?

5. What is meant by private ownership of property? What is the essence of this thing which we call ownership in property?
6. What is a hereditament? a corporeal hereditament? an incorporeal hereditament?
7. What is real property? What is the extent of ownership in real property?
8. What is the distinction between real property and personal property? Is the distinction between the two classes of property logical, historical, or accidental?
9. What is the difference between a chattel real and a chattel personal? How do you explain the fact that a chattel real is regarded in law as personal property?
10. What is the difference between tangible and intangible personal property? Between corporeal and incorporeal personal property?
11. What is meant by a *chose in action?* Is it property? What is the difference between a *chose in action* and a *chose in possession?*
12. A leases Blackacre to B for a period of 25 years. What is the nature of B's interest in Blackacre?
13. A pledges his automobile with B for two months as security for a debt. What kind of property interest does B have in the machine? What kind of property interest does A have after the pledge?
14. P sells goods to D for which D agrees to pay $500 within thirty days. What is the nature of P's claim against D? Is it property? What kind of property is it?
15. D negligently injures P. P has a claim for damages against D in an action for a tort. What is the nature of this claim? Is it a property right? If so, what kind of a right is it?
16. It is said that the law of personal property is more enlarged and less technical than the law of real property. Is this true? If it is, how do you explain it?
17. Compare the relative importance of real and personal property when the manorial organization flourished; during and immediately preceding Blackstone's time; at the present time.

2. Personal Property

a) The Nature of Personal Property Rights

DEADERICK *v.* OULDS

86 Tennessee Reports 14 (1887)

LURTON, J. This is an action of replevin for the recovery of one walnut log. The defendant, Oulds, during the year 1883, cut and put in the headwaters of the Nollachucky River some eight hundred walnut logs, to be floated during the tides in the stream through the

gorge in the mountains to a boom built by himself below the gorge. He undertook to have all the logs branded with the letter "D," and while the proof shows it possible that some of the logs were so branded, yet there is sufficient proof to justify finding that many of his logs were unmarked. Many of the defendant's logs failing to reach the boom, he, in 1885, sent hands up into the gorge to search for logs which might have lodged upon the banks of the stream or upon rocks or drifts. These hands found a number of logs stranded upon rocks or caught by drifts, which were branded with the mark of the defendant. With some of these logs found entangled in a drift was found the log now in controversy, it being without any mark or brand. This log was claimed by the servants of defendant for him, and it was again drifted along with the branded logs, that it might be carried by the current to the boom of the defendant below the gorge. This boom gave way before all these reclaimed logs reached it and the defendant was obliged to rely upon catching his logs upon the broken boom. In December, 1885, this unbranded log, together with a marked one, were cast by the current upon an island in the stream belonging to plaintiff, Deaderick, who notified defendant, Oulds, not to move it until he identified it as his own. Oulds did identify it by peculiar cracks upon the end as the same unmarked log found by his servants entangled in a drift within the gorge of the mountains, and placed by them in the river; he, therefore, claiming it as his own, removed it from the island to the public road, where it was replevied by plaintiff. While the proof shows that between the time defendant's logs were placed in the river and the finding of this unmarked log, that no other person is known to have placed walnut logs in this river above the gorge, to be floated down, yet it is shown that in 1883, one Wilson, who had cut walnut logs, to be sawed on his own premises above the gorge, lost by a high rise thirty unbranded logs, which had been carried down the stream. The contention of the plaintiff, Deaderick, is that this unmarked log is more probably one of Wilson's logs than one cut by Ould, and that as the log was found upon his lands that defendant cannot take the log therefrom without proving that he himself is the owner. The proof fails to establish the log to be one cut by defendant Ould, but it does satisfactorily show that it is the one found by the defendant's servants, lodged in a drift within the mountain gorge, and set adrift in the stream, to be floated to defendant's boom below gorge. On these facts can the plaintiff recover?

The claim of plaintiff rests upon the proposition that the log is a lost log and that, being found upon his land he can hold it against everyone but the true owner. This claim is not well founded. This log was lost, and had been lost in all probability for two or more years when found entangled among the rocks and drifts in the gorge by the servants of the defendant. It was then claimed for defendant, and possession taken. This right of possession was not lost by the log subsequently drifting upon the land of the plaintiff, and the defendant had a right to take and hold this log against all but the true owner, or one having a superior right of possession to that of the finder of lost property. It is undoubtedly true that it is not necessary in all cases that the plaintiff in trover or replevin must have an absolute right of property in the subject-matter of the litigation, but it is equally true that he must have a right of possession relatively superior to that of the defendant. Such a superior right of possession is not shown on the part of the plaintiff in this case. The prior finding and possession of the defendant is sufficient not only to defeat the contention of the plaintiff but was a sufficient title to have supported an action of replevin to recover the possession from any but the true owner. 2 Waite's *Actions and Defenses*, 234; and 6 Waite's *Actions and Defenses*, 153; Smith's *Leading Cases*, 7th ed., 648 and cases cited.

It is essential, however, in such cases that the property must be *found;* that is, it must, at the time when the finder came upon it, have been in such a situation as to clearly indicate that it was lost, and not voluntarily placed by the owner where it was found, by carelessness or forgetfulness. If it was evidently laid where it was found, it then becomes the duty of the owner of the premises to keep the property for the owner, as in such cases he is treated as a *quasi* bailee, and he may maintain trover therefor against the finder; as if a pocket-book is found upon a desk or counter in a store or bank, the presumption is that the owner placed it there and forgot it. Waite's *Actions and Defenses*, Vol. 6, 153–54 and cases cited.

In Tennessee where a pocket-book was laid on a counter by the owner and forgotten, it was held that it was constructively in the possession of the owner and larceny could be maintained against the owner of the premises who took the book, knowing the owner. *Lawrence* v. *State*, 1 Humph., 228; *Pritchett* v. *State*, 2 Sneed., 288.

This log was not unintentionally laid or deposited by the owner on the land of the plaintiff, and hence he was not a *quasi* bailee for

the owner, and cannot hold against the superior right of the defendant, growing out of his prior possession and early finding of the log.

The distinction which undoubtedly exists between the rights of a riparian proprietor to driftwood and other accretions which may drift upon his land, and the finding by the stranger, upon the premises of another, of articles dropped, need not be discussed here, for a riparian proprietor could not detain property stranded upon his bank as against either the true owner, or one having a superior right of possession by reason of an earlier possession.

His Honor, the Circuit Judge, tried this case without the intervention of a jury, and decided in favor of the plaintiff. In his special findings, he held that under the facts as above detailed, the plaintiff, Deaderick, was a special bailee and as such was entitled to hold the log as against all but the true owner. In this we think he committed an error of law.

The case will be reversed and judgment rendered here in favor of the defendant.

QUESTIONS

1. What was the action which was brought in the principal case? What must the plaintiff allege and prove in order to recover in this action? Why did the plaintiff in this case fail to recover?
2. What rule of law is laid down by the principal case? What social policy is crystallized in this decision?
3. What would have been the decision of the court in case the original owner of the log had brought the action against the defendant?
4. P, while trespassing upon the land of D, loses his watch. D finds the watch but refuses to surrender it to P on demand. What are P's rights against D?
5. A pocket-book was left by an unknown person on a table in a barber shop. D picked it up and carried it away. P, the barber, sues D in trover for conversion of the article. What decision?
6. P, a servant in a hotel, found a roll of bank notes in the public parlor. Upon suggestion of D, the hotel proprietor, that they belonged to a certain guest, P handed them over to D. The notes were not called for and P demanded them of D. D refused to surrender the notes. P thereupon brought an action against D in trover for conversion of the notes. What decision?
7. P, being in the shop of D, picked up a parcel containing bank notes. D, at the request of P, took charge of them to be held for the owner. After three years P demanded them, no one having claimed them meanwhile. D refused to deliver them up to P. What are the rights of P, if any, against D?

DURFEE *v.* JONES

11 Rhode Island Reports 588 (1877)

DURFEE, C. J. The facts in this case are briefly these: In April 1874 the plaintiff bought an old safe and soon afterward instructed his agent to sell it again. The agent offered to sell it to the defendant for ten dollars, but the defendant refused to buy it. The agent then left it with the defendant, who was a blacksmith, at his shop for sale for ten dollars, authorizing him to keep his books in it until it was sold or reclaimed. The safe was old-fashioned, of sheet iron, about three feet square having a few pigeon-holes and a place for books, and back of the place for books, a large crack in the lining. The defendant shortly after the safe was left, upon examining it, found secreted between the sheet iron exterior and the wooden lining a roll of bills amounting to $165 of the denominations of the national bank bills which have been current for the last ten or twelve years. Neither the plaintiff nor the defendant knew the money was there before it was found. The owner of the money is still unkown. The defendant informed the plaintiff's agent that he had found it, and offered it to him for the plaintiff; but the agent declined it, stating that it did not belong to either himself or the plaintiff, and advised the defendant to deposit it where it would be drawing interest until the rightful owner appeared. The plaintiff was then out of the city. Upon his return, being informed of the finding, he immediately called on the defendant and asked for the money but the defendant refused to give it to him. He then, after taking advice, demanded the return of the safe and its contents, precisely as they existed when placed in the defendant's hands. The defendant promptly gave up the safe, but retained the money. The plaintiff brings this action to recover it or its equivalent.

The plaintiff does not claim that he acquired, by purchasing the safe, any right to the money in the safe as against the owner; for he bought the safe alone and not the contents in the safe. See *Merry* v. *Green*, 7 M. & W. 623. But he claims that as between himself and the defendant his is the better right. The defendant however, has the possession, and therefore it is for the plaintiff, in order to succeed in his action, to prove his better right.

The plaintiff claims that he is entitled to have the money by the right of prior possession. But the plaintiff never had any possession of the money, except unwittingly, by having possession of the safe

which contained it. Such possession, if possession it can be called, does not of itself confer a right.

For though the bills were originally deposited in the safe by design, they were not so deposited in the safe after it became the plaintiff's safe, so as to be in the protection of the safe as his safe, or so as to affect him with any responsibility for them.

The plaintiff also claims that the money was not lost but designedly left where it was found, and that therefore as owner of the safe he is entitled to its custody. He refers to cases in which it has been held, that money or other property voluntarily laid down and forgotten is not in legal contemplation lost, and that of such money or property the owner of the shop or place where it is left is the proper custodian of it rather than the person who happens to discover it first. *State* v. *McCann*, 19 Mo., 249; *Lawrence* v. *The State*, 1 Humph., 228; *McAvoy* v. *Medina*, 11 Allen, 549. It may be questioned whether this distinction has not been pushed to the extreme. See *Kincaid* v. *Eaton*, 98 Mass., 139.

But, however that may be, we think the money here, though designedly left in the safe, was probably not designedly put in the crevice or interspace where it was found, but that being left in the safe, it probably slipped or was accidentally shoved into the space where it was found without the knowledge of the owner, and so was lost, in the stricter sense of the word. The money was not simply deposited and forgotten, but deposited and lost by reason of a defect or insecurity in the place of deposit.

The plaintiff claims that the act of finding was a wrongful act on the part of the defendant, and that therefore he is entitled to recover the money or to have it replaced. We do not so regard it. The safe was left with the defendant for sale. As seller he would probably examine it under an implied permission to use it for his books; he would have the right to inspect it to see if it was a depository. And finally as a possible purchaser he might examine it, for though he had once declined to purchase, he might on closer examination change his mind. And the defendant having found in the safe something which did not belong there, might, we think, properly remove it. He certainly would not be expected either to sell the safe to another, or to buy it himself without first removing it. It is not pretended that he used any violence or did any harm to the safe. And it is evident that the idea that any trespass or tort had been committed did not even occur to the plaintiff's agent when he was first informed of the finding.

The general rule undoubtedly is, that the finder of lost property is entitled to it against all the world except the real owner, and that ordinarily the place where it is found does not make any difference. We cannot find anything in the circumstances of the case at bar to take it out of this rule.

We give the defendant judgment for costs.

QUESTIONS

1. Is there any justification for the decision of the court in this case?
2. The court said that the plaintiff never had any real possession of the money. Is there any doubt but that for a while the plaintiff had actual physical control over the money in question? What more is necessary to constitute possession?
3. Suppose that P when he came into possession of the safe had said, "I claim this safe and everything which may be in it," would the decision of the court have been the same?
4. Suppose that X, the original owner of the safe, had placed the money in the very place where it was found, had given the safe to P and had intended that he should find and keep the money. Under these circumstances would the plaintiff have been entitled to the return of the money?
5. Suppose that while the safe was in P's possession, D, a prospective purchaser, had examined it and found the money. What would have been the rights of P, if any, against D?
6. Suppose that while the safe was in the plaintiff's possession, T, a thief, had broken into his house and had found the money. What would have been the rights of P, if any, against T?
7. D, a conductor on a railroad, found money in the car which he was serving. The company demanded the money and upon D's refusal to return brought an action for its recovery. What decision?
8. D, while dredging a canal belonging to P, found certain personal property which P did not know was there. P sues for its return. What decision?

BREWSTER *v.* WARNER

136 Massachusetts Reports 57 (1883)

The plaintiff on September 15, 1881, hired a horse and carriage from the livery stable of one Foster in Boston to drive to Beacon Park and return. Just before reaching the Park gate a servant of the defendant's who was driving a pair of horses hitched to a hack, carelessly, as it was alleged, drove against the carriage in which the plaintiff was driving, and injured it. This was an action in tort to recover the damages so sustained.

Foster was the owner of the carriage injured. The plaintiff told Foster to send the carriage to a repair shop and have it repaired, and he would pay the bill. The carriage was repaired and the bill for repairs was made to the plaintiff and presented to him for payment; but he had not paid it at the time of the trial.

This was the evidence as to the ownership, use, and repair of the carriage. The defendant requested the judge to rule that, upon the evidence, the plaintiff could not recover, regardless of the question of negligence. But the judge ruled otherwise, and found for the plaintiff, and the defendant alleged exceptions.

HOLMES, J. The modern cases follow the ancient rule, that a bailee can recover against a stranger for taking chattels from his possessions. *Shaw* v. *Kaler*, 196 Mass. 448; *Swire* v. *Leach*, 18 C.B. (N.S.) 479. And as the bailee is no longer answerable to his bailor for the loss of goods without his fault, his right to recover must stand upon his possession, in these days at least, if it has not always done so. But possession is as much protected against one form of trespass as another, and will support an action for damages to property as well as one for wrongfully taking or destroying it. No distinction has been recognized by the decisions. *Rooth* v. *Wilson*, 1 B. & Ald. 59; *Croft* v. *Alison*, 4 B. & Ald. 590; *Johnson* v. *Holyoke*, 105 Mass. 80. The ruling requested was obviously wrong, as it denied all right of action to the plaintiff, and was not confined to the *quantum* of damages.

Even if the question before us were whether the plaintiff could recover full damages, his right to do so could not be denied as a matter of law. A distinction might have been attempted, to be sure, under the early common law. For although the bailee's right was undoubtedly to recover full damages for goods wrongfully taken from him, this was always accounted for by his equally undoubted responsibility for their loss to his bailor and there is no satisfactory evidence of any strict responsibility for damage to goods which the bailee was able to return in specie.

But if this reasoning would ever have been correct, which is not clear, it cannot longer apply when the responsibility of bailees is the same for damage to goods as for their loss, and when the ground of their recovery for either is simply their possession. Any principle that permits a bailee to recover full damages in the one case, must give him the same right in the other. But full damages have been allowed for taking goods, in many modern cases, although the former

responsibility for the goods has disappeared and has been converted by misinterpretation into the now established responsibility for the proceeds of the action beyond the amount of the bailee's interest.

If the bailee's responsibility over in this modern form is not sufficient to make it safe in all cases to recognize his right to recover full damages, even where it was formerly undoubted, at least it applies as well to recoveries for harm done to property as it does to those for taking. *Ridge* v. *Coleraine*, 11 Gray, 157. And if full damages are ever to be allowed, as it is settled that they may be, they should be recovered in the present case, where the plaintiff appears to have made himself debtor for the necessary repairs with the bailor's assent. *Johnson* v. *Holyoke*, *ubi supra*. It is not necessary to consider what steps might be taken if the bailor should seek to intervene to protect his interests.

Exceptions overruled.

QUESTIONS

1. What instruction did the defendant request the court to give to the jury? What instruction did the court give?
2. What would have been the decision of this court in case Foster had been suing the defendant for the damages caused to the carriage?
3. Suppose that the plaintiff and Foster had started separate actions against the defendant, what would have been the decision in each case?
4. Upon what theory does the court permit a recovery by the plaintiff in the principal case?
5. X hires a horse to P for six months. Ten days later, the horse is injured through D's negligence and dies. (*a*) What are P's rights against D? (*b*) What are X's rights against D?
6. X stores his silver with P for safekeeping. T breaks in and steals the property. (*a*) What are P's rights against T? (*b*) What are X's rights against T?
7. D hires his horse to P for six months. At the end of two months, D retakes his horse without P's consent. What are P's rights, if any, against D?

WENTWORTH *v.* DAY

3 Metcalf's Massachusetts Reports 352 (1841)

SHAW, C. J. Although the finder of lost property on land has no right of salvage at common law, yet if the loser of property, in order to stimulate the vigilance and industry of others to find and restore it, will make an express promise of a reward, whether to a particular

person, or in general terms to anyone who will return it to him, and, in consequence of such offer, one does return it to him, it is a valid contract. Until something is done in pursuance of it, it is a mere offer, and may be revoked. But if, before it is retracted, one so far complies with it, as to perform the labor for which the reward is stipulated, it is the ordinary case of labor done on request, and becomes a contract to pay the stipulated compensation. It is not a gratuitous service, because something is done which the party was not bound to do, and without such offer might not have done. *Symmes* v. *Frazier*, 6 Mass., 344.

But the more material question is, whether, under this offer of reward, the finder of the defendant's watch, or the father who acted in his behalf had a lien on the watch, so that he was not bound to deliver it till the reward was paid.

A lien may be given by express contract, or it may be implied from general custom, from the usage of particular trades, from the course of dealing between the particular parties to the transaction, or from the relations in which they stand, as principal and factor. *Green* v. *Farmer*, 4 Burr. 221. In *Kirkman* v. *Shawcross*, 6 T. R. 14, it was held that where certain dyers gave general notice to their customers that on all goods received for dyeing, after such notice, they would have a lien for their general balance, a customer dealing with such dyers after notice of such terms must be taken to have assented to them, and thereby the goods become charged with such lien, by force of the mutual agreement. But in many cases the law implies a lien, from the presumed intention of the parties arising from the relation in which they stand. Take the ordinary case of the sale of goods, in a shop or other place, where the parties are strangers to each other. By the contract of sale, the property is considered as vesting in the vendee; but the vendor has a lien on the property for the price, and is not bound to deliver it, till the price is paid. Nor is the purchaser bound to pay, till the goods are delivered. They are acts to be done mutually and simultaneously. This is founded on the legal presumption, that it was not the intention of the vendor to part with his goods till the price should be paid, nor that of the purchaser to part with his money till he should receive the goods. But this presumption may be controlled by evidence proving a different intent, as that the buyer shall have credit, or the seller be paid in something other than money.

In the present case, the duty of the plaintiff to pay the stipulated reward arises from the promise contained in his advertisement. That promise was that whoever should return his watch to the printing office should receive twenty dollars. No other time or place of payment was fixed. The natural, if not the necessary implication is, that the acts of performance were to be mutual and simultaneous: the one to give up the watch on payment of the reward; the other to pay the reward on the receipt of the watch. Such being, in our judgment, the nature and legal effect of this contract, we are of opinion that the defendant, on being ready to deliver the watch, had a right to receive the reward in behalf of himself and his son, and was not bound to surrender the actual possession of it till the reward was paid; and therefore a refusal to deliver it, without such payment, was not a conversion.

It was competent for the loser of the watch to propose his own terms. He might have promised to pay the reward at a given time after the watch should have been restored, or in any other manner consistent with a lien for the reward, on the articles restored; in which case, no such lien would exist. The person restoring the watch would look only to the personal responsibility of the advertiser. It was for the latter to consider, whether such an offer would be equally efficacious in bringing back his lost property itself; or whether, on the contrary, it would not afford to the finder a strong temptation to conceal it. With these motives before him, he made an offer, to pay the reward on the restoration of the watch; and his subsequent attempt to get the watch, without performing his promise, is equally inconsistent with the rules of law and the dictates of justice.

The circumstances, in this case, that the watch was found by the defendant's son and by him delivered to his father, make no difference. Had the promise been to pay the finder, and were the suit brought to recover the reward, it would present a different question. Here the son delivered the watch to the father, and authorized the father to recover the reward for him. If the son had a right to detain it, the father had the same right and his refusal to deliver it to the owner, without payment of his reward, was no conversion.

Judgment for the defendant.

QUESTIONS

1. What was the issue under consideration in the principal case? How was the issue decided? What rule of law can be deduced from the decision?
2. D found a starving horse wandering at large which he took up and fed for two months. P identified the horse as his own and demanded possession of it. D refused to surrender the horse unless P would pay him for the care and upkeep of the animal. P sued D in trover for conversion of the horse. What decision?
3. Suppose that the plaintiff in the principal case had offered to pay a reward ten days after the return of the property, what would have been his rights against the finder?
4. What is meant by a lien? What is the essence of a lien? How does a lien come into existence? How was the lien created in the principal case?
5. P has a lien on D's horse. D removes the horse from P's possession without his consent. What are the rights of P against D?
6. D, a hotel proprietor, refused to allow P to remove his trunk from the hotel unless P would pay his hotel bill. P sued D in trover for conversion of the trunk. What decision?
7. The D Company, a common carrier, transported goods for P from X to Y. The carrier refused to deliver possession of the goods to P because of the latter's failure to pay the freight charges. P sued the carrier in trover for the goods. What decision?
8. D sold ten bales of cotton to P for $1,000. D would not deliver possession of the cotton until P paid the purchase price. P sued D in trover for conversion of the cotton. What decision?
9. In the foregoing case, D extended credit to P for thirty days. Still D refused to deliver possession of the cotton to P. What decision in an action of trover by P against D?
10. Before the expiration of the period of credit, P becomes insolvent. How does this fact affect the relation between the parties?

HANNA *v.* PHELPS

7 Indiana Reports 21 (1855)

In this case the plaintiff had delivered some pork to the defendants to be made into lard. Part of the lard so rendered was delivered to the plaintiff but the plaintiff did not pay for it upon delivery. When he demanded the remainder of the lard, to which he was entitled, he did not offer to pay the defendants for their services. The defendants refused to deliver any more lard without offering any reason for their

refusal. The plaintiff sued in trover for the conversion of the lard. Judgment was given for the plaintiff.

DAVIDSON, J. These were all the facts proved in the case; and upon them the court, as a conclusion of law, decided that no payment or tender for services in rendering the lard, was necessary before suit.

Was this decision correct? Generally speaking, if a chattel delivered to a party receive from his labor and skill an increased value, he has a specific lien upon it for his remuneration, provided there is nothing in the contract inconsistent with the existence of the lien. And such lien exists equally whether there be an agreement to pay a stipulated price for the "labor and skill," or an implied contract to pay a reasonable price. The present is one of the cases in which liens usually exist in favor of the party who has bestowed services on property delivered to him for that purpose. And unless the record discloses facts or circumstances sufficient to produce the inference that the defendants waived their lien before the institution of this suit, they were not compelled to give up the property, when the plaintiff demanded it, without the payment or tender of a reasonable compensation for rendering and barreling the lard. If the defendants, at the time of the demand, had refused, on the ground of their lien, to part with the property, the law of this case would be clearly in their favor; but here the plaintiff's demand was answered by an absolute refusal to deliver any more lard. We are therefore to inquire whether that refusal waived the lien.

An unqualified refusal, upon a demand duly made, is evidence of a conversion; because it involves a denial of any title whatever in the person who made the demand. In the case before us, the defendants "declined to deliver any more lard." This was, in effect, an assumption that they had in their possession no more belonging to the plaintiff. At least he had a right to infer from their answer to his demand, that they would deliver to him no more lard, unless compelled to do so by action of law. And having thus assumed a position relative to the property inconsistent with his title, he had, further, the right to infer that a tender to the defendants for their services would be unavailing. We are of opinion that the facts proved are sufficient to sustain the judgment.

QUESTIONS

1. With what offense were the defendants charged in this action? What facts were relied upon by the plaintiff to make out the liability of the defendants?

2. Suppose that the defendants had said that they would deliver no more lard until their services had been paid for, would the decision have been the same?
3. D repairs machinery for P and returns it to the latter without receiving payment for his services. Later the same machinery again comes into D's possession for repairs. D refuses to surrender the property until P pays not only for the repairs on this occasion but also for the previous repairs. P sues D in trover for conversion of his property. What decision?
4. Does an innkeeper have a lien on the property of his guests to secure the payment of lodging? If so, what is the nature of it? Why is it given to him?
5. Does a carrier have a lien upon property which it transports for its carrying charges? If so, what is the nature of the lien? Why is it given to the carrier?
6. In what way or ways can the creditor realize on his lien?

HENRY *v.* STATE

110 Georgia Reports 750 (1900)

LEWIS, J. Sherman Henry was placed upon trial in the city court of Albany, upon an accusation charging him with entering the dwelling-house of one Tempie Mack with intent to steal, and with wrongfully, fraudulently, and privately taking and carrying away therefrom, with intent to steal the same, one suit of clothes and one bicycle of the value of fifteen dollars, the personal property of said Mack. To this accusation he pleaded not guilty. Briefly stated, the following is the substance of the testimony introduced on the trial: Tempie Mack, the prosecutrix, testified that the accused came to her to engage board. She replied to him that he would have to pay her in advance, as she had lost so much by boarders. Accused replied that he had a trunk full of clothes and a bicycle, and that he would deliver them to her as security for the board. This conversation took place during the day, and that night the accused came back to the home of the prosecutrix, bringing with him his trunk and bicycle, and said: "Here is a suit of clothes that cost me $8.00 and a bicycle, that I can turn over to you as security for my board." She accordingly received these chattels, and had them placed in a room in her house occupied by her son. The accused also was assigned to this room, where he lodged as a boarder. He kept the key to his trunk, wore the clothes and rode the bicycle occasionally. In the

trunk was a new suit of clothes. He agreed to pay $2.00 per week for board and he remained in the house as a boarder a little over three weeks, for which he was due $7.00. A demand was made on him for the money. He left the house, leaving the bicycle and trunk therein. Two or three days afterwards, the landlady missed the bicycle. She then examined his trunk, and found the new suit of clothes had also been taken away. It further appeared from the testimony that the accused had sold the bicycle and was wearing the new suit of clothes in another place where he was engaged in work. The accused introduced no evidence, but made a statement, in which he admitted that he told the landlady that his trunk and clothes would be responsible for his board, but denied delivering them to her, stating that he kept the key to his trunk, wore the clothes and rode his bicycle whenever he wished; said he did not intend to steal anything, but he put on the new suit of clothes to attend to a job in Arlington, where he was working when arrested, and simply desired to make some money so that he could pay his board. The judge of the city court, before whom the case was tried without a jury, after hearing the evidence, found the accused guilty; whereupon he made motion for a new trial, on the general grounds that the verdict was contrary to law and evidence. To the judgment of the court overruling this motion the accused excepts.

There can be no question about the soundness of the proposition that property stolen from a bailee may be charged in an indictment to be his property, and authorities have even gone to the extent of holding that property, stolen from one who had himself stolen it, can be alleged as his. It is equally true that property in the hands of a bailee may be stolen by the general owner. Clark's *Criminal Law*, 246–47; 18 Am. Eng. Enc. L. 598–99. In the case of *Wimbish* v. *State*, 89 Ga. 294, it was decided by this court that "the ownership of personal property, in an indictment for larceny, may be laid in a bailee having possession of the property when it was stolen, though the bailment was gratuitous."

From these principles it necessarily follows that when property has been delivered by the owner to one as a pledge to secure a debt, the pledgee has sufficient interest in the same to maintain a prosecution against anyone, even the general owner, by charging that the property belonged to him, the pledgee. We do not understand, however, that this principle is denied. Counsel for plaintiff in error seeks a reversal in this case upon the idea that the testimony does not

show such a delivery of the property in question as would constitute a valid pledge in law. We think there is sufficient testimony for the judge to infer an actual delivery by the accused of the property as security for the payment of his board. The fact that he was permitted to use it does not deprive the pledgee in this case of the right to its custody and control. Nothing can be gathered from the evidence in the record to indicate that she ever consented to such a use or disposition of the same as to absolutely deprive her of such possession. A portion of the property pledged was actually sold to another party by the pledgor without her knowledge or consent; and the circumstances developed by the evidence touching the manner of its disposition by the pledgor were amply sufficient for the judge to infer that he had a fraudulent purpose of depriving his creditor of this security. This identical question was made and passed upon by the supreme court of Iowa in the case of *Bruley* v. *Rose*, reported in 11 N.W. Rep. 629. It was there decided: "A pledgee has a special property in the thing pledged and a pledgor who takes the property from the pledgee's possession, with the felonious design of depriving such pledgee of his security may be guilty of larceny."

Applying these principles to the facts in this case, we think the court did right in overruling the motion for a new trial.

Judgment affirmed.

QUESTIONS

1. For what offense was the defendant being tried in this case? Upon what defense did he rely?
2. What was the relation which existed between the defendant, Tempie Mack, and the property in question?
3. X pledges property to P. P permits X to use it occasionally. (*a*) X sells and delivers the property to D, who knows of the pledge. (*b*) X sells and delivers it to D who does not know of the pledge. (*c*) X retains possession and refuses to surrender it to P. What are P's rights under each hypothesis?
4. P steals a watch from X. D steals the same watch from P. What are the rights, if any, of P against D?
5. D pledges a promissory note to P. P returns it to D with the understanding that D is to give another note in its place which, later, P refuses to do. P sues D for conversion of the note. What decision?

b) Acquisition and Disposition of Personal Property Rights[1]

We are next to consider the title to things personal, or the various means of acquiring, and of losing, such property as may be had therein:

[1] 2 Blackstone, *Commentaries on the Laws of England*, pp. 400–404.

both of which considerations of gain and loss shall be blended together in one and the same as was done in our observations upon real property; since it is for the most part impossible to contemplate the one, without contemplating the other also. And these methods of acquisition or loss are principally twelve: (1) by occupancy; (2) by prerogative; (3) by forfeiture; (4) by custom; (5) by succession; (6) by marriage; (7) by judgment; (8) by gift; (9) by contract; (10) by bankruptcy; (11) by testament; (12) by administration.

And first, a property in goods and chattels may be acquired by occupancy which we have more than once remarked, was the original and primitive mode of acquiring any property at all; but which has since been restrained and abridged, by the positive laws of society, in order to maintain peace and harmony among mankind. For this purpose, by the laws of England, gifts and contracts, testament legacies, and administrations have been introduced and countenanced, in order to transfer and continue that property and possession in things personal, which has once been acquired by the owner. For the most part they belong to the king by virtue of his prerogative; except in some few instances wherein the original and natural right of occupancy is still permitted to subsist, and which we are now to consider.

Thus, in the first place, it hath been said, that anybody may seize to his own use such goods as belong to an alien enemy. For such enemies, not being looked upon as members of our society, are not entitled during their state of enmity to the benefit of protection of the laws; and therefore every man that has opportunity is permitted to seize upon their chattel, without being compelled as in other cases to make restitution or satisfaction to the owner. But this, however generally laid down by some of our writers, must in reason and justice be restrained to such captors as are authorized by the public authority of the state, residing in the crown; and to such goods as are brought into this country by an alien enemy, after a declaration of war without a safe-conduct passport. And therefore, it hath been holden, that where a foreigner is resident in England, and afterward a war breaks out between his country and ours, his goods are not liable to be seized. It hath also been adjudged, that if an enemy takes the goods of an Englishman, which are afterward retaken by another subject of this kingdom, the former owner shall lose his property therein, and it shall be indefeasibly vested in the second taker; unless they were retaken the same day and the owner before

sunset puts in his claim of property. Which is agreeable to the law of nations, as understood in the time of Grotius even with regard to captures made at sea, which are held to be the property of the captors after a possession of twenty-four hours; though the modern authorities require that before the property can be changed, the goods must have been brought into port and have continued a night *intra praesidia*, in a place of safe custody, so that all hope of recovering them was lost.

Thus again, whatever movables are found upon the surface of the earth, or in the sea and are unclaimed by any owner, are supposed to be abandoned by the last proprietor; and as such, are returned into the common stock and mass of things: and therefore they belong, as in a state of nature, to the first occupant or fortunate finder, unless they fall within the description of waifs, or estrays or wrecks, or hidden treasure; for these, we have formerly seen are vested by law in the king, and form a part of the ordinary revenue of the crown.

Thus, too, the benefit of the elements, the light, the air, and the water can only be appropriated by occupancy. If I have an ancient window overlooking my neighbor's ground, he may erect any blind to obstruct the light; but if I build my house close to his wall, which darkens it, I cannot compel him to demolish his wall; for there the first occupancy is rather in him, than in me. If my neighbor makes a tan-yard, so as to annoy and render less salubrious the air of my house or gardens, the law will furnish me with a remedy; but if he is first in possession of the air, and I fix my habitation near him, the nuisance is my own seeking, and may continue. If a stream be unoccupied, I may erect a mill thereon and detain the water; yet not so as to injure my neighbor's prior mill, or his meadow; for he hath by the first occupancy acquired a property in the current.

With regard likewise to animals *ferae naturae*, all mankind had by the original grant of the Creator a right to pursue and take any fowl or insect of the air, any fish or inhabitant of the waters, and any beast or reptile of the field and this natural right still continues in every individual, unless where it is restrained by the civil laws of the country. And when a man has once seized them, they become while living his qualified property, or, if dead, are absolutely his own; so that to steal them or otherwise invade this property, is according to their respective values, sometimes a criminal offense, sometimes only a civil injury. The restrictions which are laid upon this right, by the laws of England, relate principally to royal fish, as whale and sturgeon and such terrestrial, aerial, or aquatic animals, as go under

the denomination of game; the taking of which is made the exclusive right of the prince and such of his subjects to whom he has granted the same royal privilege. But those animals, which are not expressly so reserved, are still liable to be taken and appropriated by any of the king's subjects, upon their own territories. in the same manner as they might have taken even game itself, till these civil prohibitions were issued: there being in nature no distinction between one species of wild animal and another, between the right of acquiring property in a hare or a squirrel, in a partridge or a butterfly: but the difference, at present made, arises merely from the positive municipal law.

To this principle of occupancy also must be referred the method of acquiring a special personal property in corn growing on the ground, or other emblement, by any possessor of the land who hath sown or planted it, whether he be the owner of the inheritance in fee or in tail, or be a tenant for life, for years, or at will: which emblements are distinct from the real estate in the land, and subject to many, though not all, the incidents attending personal chattels. They were devisable by testament before the statute of wills, and at the death of the owner shall vest in his executor and not his heir; they are forfeitable by outlawry in a personal action: and by statute, though not by the common law, they may be distrained for rent in arrears. The reason for admitting the acquisition of this special property, by tenants who have temporary interests, was formerly given, and it was extended to tenants in fee, principally for the benefit of their creditors: and therefore though the emblements are assets in the hands of the executor, are forfeitable upon outlawry and distrainable for rent, they are not in other respects considered as personal chattels; and particularly they are not the object of larceny, before they are severed from the ground.

QUESTIONS

1. Is it still the law that one may seize and become owner of personal property belonging to an alien enemy? How was alien enemy property handled by the United States during the recent war?
2. In what different ways may title to personal property be acquired? In what ways may title be disposed of? What are the principal ways at present of acquiring and disposing of ownership in personal property?
3. What is meant by *bona vacantia?* To whom does it belong?
4. How may a title be lost or acquired by judgment? How may a title be acquired or disposed of by contract?

5. What is meant by title through succession? title through testament?
6. What is meant by title to personal property? What is the difference between title and ownership?
7. How do you account for the fact that personal property can be transferred more unceremoniously than real property?
8. What is the significance of the relative ease with which personal property can be transferred in a society organized as our society is?
9. A is the owner of twenty bales of cotton. It is said that he can dispose of his ownership by a *sale*. What is a sale? What is the effect of it?
10. D owes C $500. What is the nature of C's claim against D? Can he sell it? If so, what is the transaction called? What is the effect of the transaction?
11. M executes a promissory note to the order of P in the sum of $500. Can P sell his claim against M? If so, what is the form of the transfer?
12. H is the owner of ten shares of stock in the X Company. Can he transfer this ownership? If so, in what manner?

CHAPIN *v.* FREELAND

142 Massachusetts Reports 383 (1886)

HOLMES, J. This is an action of replevin for two counters. There was evidence that they belonged to the defendant in 1867 when one Warner built a shop, put the counters in, nailed them to the floor, and afterward, on January 2, 1871, mortgaged the premises to one DeWitt. In April, 1879, DeWitt's executors foreclosed and sold the premises to the plaintiffs. The defendant took the counters from the plaintiffs' possession in 1881. The court found for the defendant. Considering the bill of exceptions as a whole, we do not understand this general finding to have gone on the ground either of a special finding that the counters remained chattels for all purposes and were not covered by the mortgage, *Carpenter* v. *Walker*, 140 Mass. 416, or that there was a fraudulent concealment of the cause of action, within the Gen. Sts. c. 155. But we understand the court to have ruled or assumed that although the statute should have run in favor of Warner or DeWitt before the transfer to the plaintiffs, that circumstances would not prevent the defendant from taking possession if she could, or entitle the plaintiffs to sue her for doing so, if she was the original owner.

A majority of the court are of opinion that this is not the law, and that there must be a new trial. We do not forget all that has been said and decided as to the statute of limitations going only

to the remedy, especially in cases of contract. We do not even find it necessary to express an opinion as to what would be the effect of a statute like ours, if a chattel, after having been held adversely for six years, were taken into another jurisdiction by the originally wrongful possessor, although all the decisions and dicta, so far as we know, agree that the title would be deemed to have passed. What we do decide is that where the statute would be a bar, to a direct proceeding by the original owner, it cannot be defeated by indirection within the jurisdiction where it is law. If he cannot replevy, he cannot take with his own hand. A title which will not sustain a declaration will not sustain a plea.

It is true that the statute, in terms, only limits the bringing of an action. But whatever importance may be attached to that ancient form of words, the principle we lay down seems to us a necessary consequence of the enactment. And a similar doctrine has been applied to the statute of frauds. *Carrington* v. *Roots*, 2 M. & W. 248.

As we understood the statutory period to have run before the plaintiffs acquired the counters, we do not deem it necessary to consider what would be the law if the plaintiffs had purchased or taken the counters, within six years of the original conversion, from the person who first converted them, and the defendant had taken them after the action against the first taker had been barred, but within six years of the plaintiffs' acquiring them. We regard a purchaser from one against whom the remedy is already barred as entitled to stand in as good a position as his vendor. Whether a second wrongful taker would stand differently, because not privy in title, we need not discuss. See *Leonard* v. *Leonard*, 7 Allen, 277; *Sawyer* v. *Kendall*, 10 Cush. 241; *Norcross* v. *James*, 140 Mass. 188.

Exceptions sustained.

QUESTIONS

1. The statute discussed in the principal case provided that "the following actions shall be commenced within six years after the cause of action accrues and not afterward: actions in replevin, and all other actions for taking, detaining, or injuring goods or chattels." What is the policy crystallized in such an enactment? When does a cause of action arise within the meaning of this statute?
2. In a state where such a statute exists, D has had possession of P's horse for six years. P sues D in replevin for the horse. What decision?
3. In the foregoing case, P gets peaceable possession of the horse and refuses to give it up. D sues P in replevin. What decision?

4. D holds the horse for six years in the state of Massachusetts and then carries the horse into the state of Maine where no such statute exists. P sues D in replevin for the horse. What decision?
5. T steals a watch from P and holds it for four years. D then steals it from T and holds it three years. P brings an action against D for his watch. What decision?

SILSBURY *v.* McCOON

3 New York Reports 379 (1850)

RUGGLES, J. It is an elementary principle in the law of all civilized communities, that no man can be deprived of his property, except by his own voluntary act or by operation of the law. The thief who steals a chattel, or the trespasser who takes it by force, acquires no title by such wrongful taking. The subsequent possession by the thief or the trespasser is a continuing trespass; and if during its continuance, the wrongdoer enhances the value of the chattel by labor and skill bestowed upon it, as by sawing logs into boards, splitting timber into rails, making leather into shoes, or iron into bars, or into a tool, the manufactured articles still belong to the owner of the original material, and he may retake it or recover its improved value in an action for damages. And if the wrongdoer sells the chattel to an honest purchaser having no notice of the fraud by which it was acquired, the purchaser obtains no title from the trespasser, because the trespasser had none to give. The owner of the original material may still retake it in its improved state, or he may recover its improved value. The right to the improved value in damages is a consequence of the continued ownership. It would be absurd to say that the original owner may retake the thing by an action of replevin in its improved state, and yet that he may not, if put to his action of trespass or trover, recover its improved value in damages. Thus far, it is conceded that the common law agrees with the civil.

They agree in another respect, to wit, that if the chattel wrongfully taken afterward comes into the hands of an innocent holder who believes himself to be the owner, converts the chattel into a thing of different species so that its identity is destroyed, the original owner cannot reclaim it. Such a change is said to be wrought when wheat is made into bread, olives into oil, or grapes into wine. In a case of this kind, the change in the species of the chattel is not an intentional

wrong to the original owner. It is therefore regarded as a destruction or consumption of the original materials, and the true owner is not permitted to trace their identity into the manufactured article, for the purpose of appropriating to his own use the labor and skill of the innocent occupant who wrought the change; but he is put to his own action for damages as for a thing consumed, and may recover its value as it was when the conversion or consumption took place.

There is a great confusion in the books upon the question what constitutes change of identity. In one case (5 Hen. 7, fol. 15), it is said that the owner may reclaim the goods so long as they may be known, or in other words, ascertained by inspection. But this in many cases is by no means the best evidence of identity; and the examples put by way of illustration serve rather to disprove than to establish the rule. The court says that if grain be made into malt, it cannot be reclaimed by the owner, because it cannot be known. But if cloth be made into a coat, a tree into squared timber, or iron into a tool, it may. Now as to the cases of the coat and the timber they may or may not be capable of identification by the senses merely; and the rule is entirely uncertain in its application; and as to the iron tool, it certainly cannot be identified as made of the original material without other evidence. This illustration therefore contradicts the rule. In another case (Moore's Rep. 20), trees were made into timber and it was adjudged that the owner of the trees might reclaim the timber "because the greater part of the substance remained." But if this were the true criterion it would embrace the cases of wheat made into bread, milk into cheese, grain into malt, and others which are put into the books as examples of a change of identity. Other writers say that when a thing is so changed that it cannot be reduced from its new form to its former state, its identity is gone. But this would include many cases in which it has been said by the courts that the identity is not done; as the case of leather made into a garment, logs into timber or boards, cloth into coat, etc. There is therefore no definite settled rule on this question; and although the want of such a rule may create embarrassment in a case in which the owner seeks to reclaim his property from the hands of an honest possessor, it presents no difficulty where he seeks to obtain it from the wrongdoer, provided the common law agrees with the civil in its principle applicable to such a case.

The acknowledged principle of the civil law is that a wilful wrongdoer acquires no property in the goods of another, either by the

wrongful taking or by any change wrought in them by his labor or skill, however great that change may be. The new product, in its improved state, belongs to the owner of the original materials provided it be proved to have been made from them; the trespasser loses his labor and that change which is regarded as a destruction of the goods, or an alteration of their identity in favor of an honest possessor, is not so regarded as between the original owner and a wilful violator of his right of property.

But it was thought in the court below that this doctrine had never been adopted into the common law, either in England or here; and the distinction between a wilful and an involuntary wrongdoer herein before mentioned, was rejected not only on that ground but also because the rule was supposed to be too harsh and rigorous against the wrongdoer.

It is true that no case has been found in the English books in which that distinction has been expressly recognized; but it is equally true that in no case until the present time has it been repudiated or denied. The common law on this subject was evidently borrowed from the Roman at an early date; and at a period when the common law furnished no rules whatever in a case of this kind. Bracton in his treatise compiled in the reign of Henry III, adopted a portion of Justinian's institutes on this subject without noticing the distinction; and Blackstone, in his commentaries, Vol. 2, 404, in stating what the Roman law was follows Bracton, but neither of these writers intimates that on the point in question there is any difference between the civil and the common law.

So long as property wrongfully taken retains its original form and substance, or may be reduced to its original materials, it belongs according to the admitted principles of the common law, to the original owner, without reference to the degree of improvement, or the additional value given to it by the labor of the wrongdoer. Nay more, this rule holds good against an innocent purchaser from the wrongdoer, although its value is increased a hundred fold by the labor of the purchaser. This is a necessary consequence of the continuance of the original ownership.

There is no satisfactory reason why the wrongful conversion of the original materials into an article of a different name or of a different species should work a transfer of the title from the true owner to the trespasser, provided the real identity of the thing can be traced by evidence. The difficulty of proving the identity is not a good reason.

It relates merely to the convenience of the remedy and not at all to the right. There is no more difficulty or uncertainty in proving that the whiskey in question was made of Wood's corn than there would have been in proving that the plaintiff had made a cup of his gold, or a tool of his iron; and yet in those instances, according to the English cases, the proof would have been unobjectionable. In all cases where the new product cannot be identified by mere inspection the original material must be traced by the testimony of witnesses from hand to hand through the process of transformation.

Again the court below seems to have rejected the rule of the civil law applicable to this case, and to have adopted a principle not heretofore known to the common law; and for the reason that the rule of the civil law was too rigorous upon the wrongdoer, in depriving him of the benefit of his labor bestowed upon the goods wrongfully taken. But we think the civil law in this respect is in conformity not only with plain principles of morality, but supported by cogent reasons of public policy, while the rule adopted by the court below leads to the absurdity of treating the wilful trespasser with greater kindness and mercy than it shows to the innocent possessor of another man's goods. A single example may suffice this to be so. A trespasser takes a quantity of iron ore belonging to another and converts it into iron, thus changing the species and identity of the article; the owner of the ore may recover its value, in trover or trespass, but not the value of the iron, because under the rule of the court, below, it would be unjust and rigorous to deprive the trespasser of the value of his labor in the transmutation. But if the same trespasser steals the iron and sells it to an innocent purchaser, who works it into cutlery, the owner of the iron may recover of the purchaser the value of the cutlery because by this process the original material is not destroyed but remains and may be reduced to its former state and according to the rule adopted by the court below as to the change of identity the original ownership remains. Thus the innocent purchaser is deprived of the value of his labor, while the guilty trespasser is not.

The rule adopted by the court below seems, therefore, to be objectionable because it operates unjustly and unequally. It not only divests the true owner of his title, without his consent, but it obliterates the distinction maintained by the civil law and as we think by the common law between the guilty and the innocent; and abolishes a salutary check against violence and fraud upon the rights of property.

We are therefore of the opinion that if the plaintiffs below in converting the corn into whiskey knew that it belonged to Wood and that they were thus using it in violation of his right they acquired no title to the manufactured article which, although changed from the original material into another of different nature, yet, being the actual product of the corn, still belonged to Wood. The evidence offered by the defendants and rejected by the circuit judge ought to have been admitted.

The right of Wood's creditors to seize the whiskey by their execution is a necessary consequence of Wood's ownership. Their right is paramount to his and of course to this election to use in trover or trespass for the corn.

The judgment of the supreme court should be reversed and a new trial ordered.

QUESTIONS

1. What was the issue under consideration in the principal case? How was the issue decided? What rule of law can be deduced from the decision?
2. X takes P's watch and sells it. After five bona fide sales of the watch, it comes to D. What are the rights of P against D?
3. D attaches his chain to P's watch, honestly believing that the watch is his own. P sues for both watch and chain. What decision?
4. What are the rights of P, the owner, against D, a wilful trespasser, under the following situations? (*a*) D takes P's horse, feeds and trains it for six months. (*b*) D takes stone worth $10 from P's quarry, and carves a statue from it worth $1,000. (*c*) D takes grapes from P's vineyard and makes from them fine wine. (*d*) D takes leather from P's tanyard and makes high-grade shoes. (*e*) D steals flour from P and makes cake out of it.
5. In the foregoing case, D is an innocent trespasser. What are P's rights against him under each hypothesis?
6. In case 4, the property in its original state is taken from P by T, a wilful trespasser, innocently bought from T by D, who converts the property into the various articles set out in 4. What are P's rights against D in each case?
7. In 4, D sells the changed article in each case to B, an innocent purchaser. What are P's rights against B in each case?
8. In case 5, D sells each article in its changed form to B, an innocent purchaser. What are P's rights against B?

RYDER *v.* HATHAWAY

21 Pickering's Massachusetts Reports 298 (1839)

MORTON, J. This is trespass *de bonis asportatis* in which the plaintiff claims to recover for twenty-three cords of wood.

It appeared in evidence, that the defendant took a certain quantity of wood but he justified the taking on the ground, that the plaintiff had cut and carried the wood from his land, and that the wood was his, and he had a lawful right to take it. The wood in controversy was cut by the plaintiff and removed by him to a landing place by the shore of the swamp, the soil of which was owned by the defendant. From this place the defendant carried it away. If the wood was really cut upon the defendant's land, the cutting and removing it by a wrong-doer would not divest him of his property in the wood, and he might lawfully remove it from the place where the plaintiff had put it.

It appeared, that a part of the wood taken by the defendant had been cut and carried to the landing-place by the plaintiff from land indisputably his own. For this part, he contended that he had a right to recover, however the title to the other lot might be decided. In relation to this part of the case, the jury were instructed, that "if a part of the plaintiff's own wood was so mixed with the defendant's wood in the same pile, either that the defendant did not know it or could not by any reasonable examination distinguish it, the taking of such part was not a trespass for which this action would lie." Now if, under any circumstances, the taking of wood thus mixed might be trespass, this general instruction would need some qualification, and without it, would be incorrect, and might mislead the jury. And although, in all other respects, the instructions are right, and this may need but a slight modification, yet even that under our practice, must lead to a new trial.

Few subjects in the law are less familiar, or more obscure, than that which relates to the confusion of property. If different parcels of chattels not capable of being identified, owned by different persons, get mixed, how are they to be severed? What are the relative rights of the different owners? Take, for example, grain or liquor. Can each one of the former owners take from the common mass his proportion, or do they become tenants in common of the whole? If one takes the whole, what shall be the remedy? Will trespass lie? If they become tenants in common, clearly not. There is some conflict

on this subject between the common law and civil law. If the intermixture takes place by accident or without the fault of the parties, it would be very unreasonable to deprive either party of his property or materially to affect his right to it. And yet oftentimes, there must be great suffering, as by the confusion of property of different kinds and qualities, as of different kinds of grain or liquors, the intermixture of which would greatly impair, if not entirely destroy the value of the whole. But it will not be useful further to consider the intermixture of property by accident, as it will not have much application to the case under consideration.

The cases of intentional intermixture present questions of greater perplexity. If the owners of goods incapable of being identified consent to intermix them, their consent makes them tenants in common. But if the property be wilfully and unlawfully intermingled, it clearly cannot constitute a tenancy in common because a person cannot be made a tenant in common or co-partner without his consent. The act of God or of the law may create such a confusion of the property of different owners, as necessarily to constitute a community of property between them. But no person, by his own act, can compel another to become his co-tenant.

By the rules of the civil law, if the intermixture was made wilfully and not by mutual consent, he who made it acquired the whole; and the only remedy for the other party was a satisfaction in damages for the property lost. Vinn. ad Inst. lib. 2 tit. 1–28. This rule seems to be very imperfect, as it would enable one person to acquire the property of another against his will merely rendering himself liable to pay the value of it. But it undoubtedly went upon the ground, that the intermixture was a conversion, and, in this respect, is analogous to many cases of trover and trespass. But our law adopts an entirely opposite rule. That very learned commentator, Chancellor Kent, in 2 Kent's Com. 297 says: "The common law, with more policy and justice, to guard against fraud, gave the entire property, without any account, to him whose property was originally invaded and its distinct character destroyed. If A will wilfully intermix his corn or hay with that of B, the whole belongs to B." *Hart* v. *Ten Eyck*, 2 Johns. Ch. R. 62.

But this rule only applies to wrongful or fraudulent intermixtures. There may be intentional intermingling, and yet no wrong intended; as where a man mixes two parcels together, supposing both to be his own, or that he was about to mingle his with his neighbor's by

agreement and mistakes a parcel. In such cases, which may be deemed accidental intermixtures, it would be unreasonable and unjust, that he should lose his own or be obliged to take his neighbor's. If they were of equal value, as corn or wood of the same kind, the rule of justice would be obvious. Let each one take his own given quantity. But if they were of unequal value the rule would be more difficult. And if the intermixture was such as to destroy the property, the whole loss should fall on him whose carelessness or folly or misfortune caused the destruction of the whole. This doctrine is recognized and discussed by Lord Eldon in *Lupton* v. *White*, 19 Ves. 432.

The intentional and innocent intermixture of property of substantially the same quality and value, does not change the ownership. And no one has a right to take the whole, but in so doing commits a trespass on the other owner. He should notify him to make a division or take his own proportion at his peril, taking care to leave the other owner as much as belonged to him. It must already have been perceived that these principles are not perfectly consistent with the unqualified rule laid down for the government of the jury.

According to the above doctrine, if the plaintiff actually supposed that the land from which the wood was taken was his own, and that all the wood was his, then the mingling it together should not divest him of that which honestly belonged to him. But if he knew that the land was not his, or if he doubted whether it was his or not, and mixed the wood, with an intent to mislead or deceive the defendant, and to prevent him from taking his own without danger of taking the plaintiff's, then he has by his own fraudulent act lost his property and can have no remedy. But if, as above stated, the plaintiff mixed the wood from the different lots, supposing all of it to be his own, and if the defendant, knowing that some part of the wood came from the plaintiff's land, took the whole, he was a trespasser and is responsible in this action for the value of the plaintiff's wood thus taken by him. But if the defendant took the wood without any knowledge that any of it belonged to the plaintiff, then he is not liable in an action of trespass, though he may be in assumpsit, if he has sold the wood, if not, in trover, after a demand and refusal. *Bond* v. *Ward*, 7 Mass. 127.

The verdict must therefore be set aside, and a new trial granted. But as the question of title has been fully and fairly tried and settled, there can be no reason for re-trying that, and the new trial must be confined entirely to the question of damages.

QUESTIONS

1. What is meant by a trespass *de bonis asportatis?*
2. What instruction did the trial court give the jury in this case? Why was it held erroneous?
3. P and D agree to mingle their wheat. What are the rights of each in the mass?
4. Hats belonging to P and D are mingled. Their hats are distinguishable. (*a*) D mingles them wilfully. (*b*) D mingles them, innocently believing that all the hats are his own. (*c*) X, an intermeddler, mixes them. What are P's rights under each supposition?
5. D mixes ten gallons of wine with twenty gallons of P's wine, (*a*) wilfully, (*b*) innocently but intentionally, (*c*) accidentally. What are P's rights under each supposition?
6. Would it matter in the foregoing case that D's wine was worth three times as much per unit as P's?
7. D wilfully mixes his grain with grain belonging to P. The grain of both is of the same grade. What are P's rights in reference to the mass?
8. D wilfully pours a pint of P's wine into a hogshead of his own. What are the rights of the parties?

RIDDEN *v.* THRALL

125 New York Reports 572 (1891)

EARL, J. We come now to the question, was the gift invalid because the donor did not die of the same disease from which he apprehended death?

Gifts *causa mortis* as well as gifts *inter vivos* are based upon the fundamental right of everyone to dispose of his property as he will. The law leaves the power of disposition complete, but to guard against fraud and imposition, regulates the methods by which it is accomplished.

To consummate a gift, whether *inter vivos* or *causa mortis*, the property must be actually delivered and the donor must surrender the possession and dominion thereof to the donee. In the case of gifts *inter vivos*, the moment the gift is thus consummated it becomes absolute and irrevocable. But in the case of gifts *causa mortis* more is needed. The gift must be made under the apprehension of death from some present disease or some other impending peril, and it becomes void by the recovery from the disease or escape from the peril. It is also revocable at any time by the donor and becomes void by the death of the donee in the lifetime of the donor. It is

not needful that the gift be made *in extremis* when there is no time or opportunity to make a will. In many of the reported cases the gift was made weeks, and even months, before the death of the donor when there was abundant time and opportunity for him to have made a will. These are the main features of a valid gift *causa mortis* as they are set forth in many textbooks and reported cases.

Counsel for the appellants would add one more prerequisite to an effectual gift, and that is that the donor, when the gift has been made in the apprehension of death from disease, must have died of the same disease, and he calls our attention to expression of judges to that effect. I have examined all cases to which he refers and many more, and find that these expressions were all made in cases where the donor died from the same disease from which he apprehended death when he made the gift, and that none of them were needful to the decision made. The doctrine meant to be laid down was that the donor must not recover from the disease from which he apprehended death. I am quite sure that no case can be found in which it was decided that death must ensue from the same disease, and not from some other disease existing at the same time, but not known.

There is no reason for this additional prerequisite. The rule is that the donor must not recover from the disease from which he then apprehended death. If he recovers the gift is void; if he does not recover, and the gift is not revoked, it becomes effectual. In this case the condition was that if he did not recover from the consequences of the operation and return from the hospital, the gift should take effect. That was a perfectly lawful condition for him as the owner of the property to impose, and no reason can be perceived for refusing to uphold a gift made under such circumstances. A donor may have several diseases, and may, in making a gift, apprehend death from one and not from the others, and shall the gift be invalid if before he recovers from the disease feared he dies from one of the other diseases? In such a case it might be, and generally would be, difficult, if not impossible, to tell what share any of the diseases had in causing the death. No medical skill could ordinarily tell that the donor would have succumbed to the disease feared if the other diseases had not been present. Here the immediate cause of death appeared to be heart disease, and the autopsy did not disclose that there was any connection between the hernia or the operation and the heart disease. But who could tell that the death would have ensued from the heart disease at that particular time, but for the operation? No medical skill

can tell that the shock from the operation, and the debility and disturbance caused thereby did not hasten death; and the death, therefore, in a proper sense, may have ensued and probably did ensue from both causes.

Sound policy requires that the laws regulating gifts *causa mortis* should not be extended, and that the range of such gifts should not be enlarged. We, therefore, confine our decision to the precise facts of this case and we go no farther than to hold that when a gift is made in the apprehension of death from some disease from which the donor did not recover, and the apparent immediate cause of death was some other disease with which he was afflicted at the same time, the gift becomes effectual.

The judgment should be affirmed, with costs.

QUESTIONS

1. What issue was under consideration in the principal case? How was it decided? What rule of law can be deduced from the decision?
2. D promises to give a horse to P. P sues D for his failure to give him the horse. What decision?
3. What is meant by a gift *inter vivos?* What are the essential elements of such a gift? What is a gift *causa mortis?* What are the essential elements of such a gift?
4. It is said that a gift *causa mortis* is the nature of a testamentary disposition of property. What is meant by this?
5. A father says to his son: "I give you this watch." But the father continues to wear and use the watch. Upon the death of the father, the son claims the watch. Is he entitled to it?
6. The father says to the son: "I give you the old horse, Rob." The horse is in the pasture with other horses owned by the father. S uses the horse as his own, but the animal continues in the pasture as before. C, a creditor, levies upon the horse as property of the father. The son claims the horse. What decision?
7. What is meant by a gift by deed? What are the essential elements of such a gift?
8. Is acceptance of the gift by the donee necessary to complete the gift?

3. Real Property

a) *Development of Ownership in Land*

i. AT LAW

A[1]

It is impossible to understand, with any degree of accuracy, either the civil constitution of this kingdom, or the laws which regulate its landed property, without some general acquaintance with the nature and doctrine of feuds, or of the feudal law: a system so universally received throughout Europe, upward of twelve centuries ago, that Sir Henry Spelman does not scruple to call it the law of nations in our western world.

The constitution of the feuds had its original from the military policy of the northern or Celtic nations, the Goths, the Huns, the Franks, the Vandals, and the Lombards, who, all migrating from the same *officina gentium*, as Crag justly entitles it, poured themselves in vast quantities into all the regions of Europe, at the declension of the Roman Empire. It was brought by them from their own countries, and continued in their respective colonies as the most likely means to secure their new acquisitions, and to that end large districts of parcels of land were allotted by the conquering general to the superior officers of the army, and by them dealt out again in smaller parcels or allotments to the inferior officers and most deserving soldiers. These allotments were called *feoda*, *feuds*, *fiefs*, or *fees*, which last appellation in the northern language signifies a conditional stipend or reward. Rewards or stipends evidently they were, and the condition annexed to them was, that the possessor should do service faithfully, both at home and in the wars, to him by whom they were given, for which purpose he took the *juramentum fidelitatis*, and in case of the breach of this condition and oath, by not performing the stipulated service, or by deserting the lord in battle, the lands were again to revert to him who granted them.

But this feudal polity, which was thus by degrees established over all the Continent of Europe, seems not to have been received in this part of our island, at least not universally and as a part of the national constitution, till the reign of William the Norman. Not but that it is reasonable to believe, from abundant traces in our history and laws, that even in the times of the Saxons, who were a swarm from what Sir

[1] 2 Blackstone, *Commentaries on the Laws of England*, pp. 44–48.

William Temple calls the northern hive, something similar to this was in use, yet not so extensively, nor attended with all the rigor that was afterward imported by the Normans. For the Saxons were firmly settled in this island, at least as early as the year 600; and it was not until two centuries after that feuds arrived at their full vigor and maturity even on the Continent in Europe.

B[1]

The grand and fundamental maxim of all feudal tenure is this: that all lands were originally granted out by the sovereign, and are therefore holden, either mediately or immediately of the crown. The grantor was called the proprietor or lord, being he who retained the dominion or ultimate property of the feud or fee; and the grantee, who had only the use and possession, according to the terms of the grant, was styled the feudatory or vassal, which was only another name for the tenant or holder of the lands; though, on account of the prejudice we have justly conceived against the doctrines that were afterward grafted on this system, we now use the word vassal approbriously, as synonymous to slave or bondman. The manner of the grant was by words of gratuitous donation, *dedi et concessi*, which are still operative words in our modern infeudations or deeds of feoffment. This was perfected by the ceremony of corporeal investiture, or open and notorious delivery of possession in the presence of the other vassals, which perpetuated among them the era of the new acquisition, at a time when the art of writing was very little known; and therefore the evidence of property was reposed in the memory of the neighborhood, who in case of a disputed title were afterward called upon to decide the difference, not only according to external proofs, adduced by the parties litigant, but also by the internal testimony of their own private knowledge.

Besides an oath of fealty, or profession of faith to the lord, which was the parent of our oath of allegiance, the vassal or tenant upon investiture usually did homage to his lord, openly and humbly kneeling, being ungirt, uncovered, and holding up his hands both together between those of the lord, who sat before him, and there professing that "he did become his man, from that day forth, of life and limb and earthly honor"; and then he received a kiss from his lord.

When the tenant had thus professed himself to be the man of his superior or lord, the next consideration was concerning the service,

[1] 2 Blackstone, *op. cit.*, pp. 53–55, 59–61.

which, as such, he was bound to render, in recompense for the land he held. This, in pure, proper, and original feuds, was only twofold: to follow or to do suit to the lord in his courts in time of peace; and in his armies or war-like retinue when necessity called him to the field. The lord was in early times the legislator and judge over all his feudatories, and therefore the vassals of the inferior lords were bound by their fealty to attend their domestic courts-baron (which were instituted in every manor or barony, for doing speedy and effectual justice to all tenants) in order as well to answer such complaints as might be alleged themselves, as to form a jury or homage for the trial of their fellow-tenants; and upon this account, in all the feudal institutions both here and on the Continent, they are distinguished by the appellation of the peers of the court, *pares curtis* or *pares curiae*. In like manner the barons themselves, or lords of inferior districts, were denominated peers of the king's courts, and were bound to attend him upon summons to hear causes of greater consequence in the king's presence and under the direction of his grand justiciary; till in many countries the power of that officer was broken and distributed into other courts of judicature, the peers of the king's court still reserving to themselves (in almost every feudal government) the right of appeal from those subordinate courts in the last resort. The military branch of the service consisted in attending the lords to wars, if called upon, with such a retinue and for such a number of days as were stipulated at the first donation, in proportion to the quantity of land.

Under the feudal system the thing holden of some superior lord is styled a tenement, the possessors thereof tenants, and the manner of possession, a tenure. Thus all the land in the kingdom is supposed to be holden mediately or immediately of the king, who is styled the lord paramount. Such tenants as held under the king immediately, when they granted out portions of their lands to inferior persons, became also lords with respect to those inferior persons, as they were still tenants with respect to the king, and thus partaking of a middle nature were called mesne lords. So that if the king granted a manor to A, and he granted a portion of it to B, now B was said to hold of A, and A of the king; or, in other words, B held his lands immediately of A, but mediately of the king. The king was, therefore, styled the lord paramount. A was both tenant and lord, or was a mesne lord, and B was tenant paravail, being he who was supposed to make avail or profit of the land. In this manner were all lands of the kingdom holden, which are in the hands of subjects, for according to

Sir Edward Coke, in the law of England, we have not properly *allodium*, which, we have seen, is the name by which the feudists abroad distinguish such estates of the subjects as are not holden of any superior. So that at the first glance we may observe that our lands are either plainly feuds or partake very strongly of the feudal nature.

C[1]

For the present I have only to observe, that by the degenerating of knight service, or personal military duty, into escutage, or pecuniary assessments, all the advantages (either promised or real) of the feudal constitution were destroyed, and nothing but the hardships remained. Instead of forming a national militia composed of barons, knights, and gentlemen, bound by their interests, their honor, and their oaths, to defend their king and their country, the whole of this system of tenures now tended to nothing else but a wretched means of raising money to pay an army of occasional mercenaries. In the meantime the families of all our nobility and gentry groaned under the intolerable burdens which (in consequence of the fiction adopted after the Conquest) were introduced and laid upon them by the subtlety and finesse of Norman lawyers. For, besides the scutages to which they were liable in defect of personal attendance, which, however, were assessed by themselves in parliament, they might be called upon by the king or lord paramount for aids, whenever his eldest son was to be knighted or his eldest daughter married, not to forget the ransom of his own person. The heir, on the death of his ancestor, if of full age was plundered of the first emoluments arising from his inheritance, by way of relief and primer seisin, and, if under age, of the whole of his estate during infancy. And then, as Sir Thomas Smith very feelingly complains, "when he came to his own, after he went out of wardship, his woods decayed, his houses fallen down, stock wasted and gone, lands let forth and plowed to be barren," to make amends he was yet to pay half a year's profits as a fine for suing out his livery and also the price or value of his marriage, if he refused such wife as his lord and guardian had bargained for, and imposed upon him, or twice that value, if he married another woman. Add to this the untimely and expensive honor of knighthood, to make his poverty more completely splendid. And when by these deductions his fortune was so shattered and ruined that perhaps he was obliged to sell his patri-

[1] 2 Blackstone, *op. cit.*, pp. 75–77.

mony, he had not even that poor privilege allowed him, without paying an exorbitant fine for a license of alienation.

A slavery so complicated and so extensive as this called aloud for a remedy in a nation that boasted of its freedom. Palliatives were from time to time applied by successive acts of parliament, which assuaged some temporary grievances, till at length the humanity of King James I consented in consideration of a proper equivalent to abolish them all, though the plan then proceeded not to effect; in like manner as he had formed a scheme, and began to put it in execution, for removing the feudal grievance of heritable jurisdictions in Scotland, which has since been pursued and effected by the statute 20 Geo. II, C. 43. King James's plan for exchanging our military tenures seems to have been nearly the same as that which has since been pursued, only with this difference, that, by way of compensation for the loss which the crown and other lords would sustain, an annual fee-farm rent should be settled and inseparably annexed to the crown and assured to the inferior lords, payable out of every knight's fee within their respective seigniories. An expedient, seemingly much better than the hereditary excise, which was afterward made the principal equivalent for these concessions. For at length the military tenures, with all their heavy appendages, were destroyed at one blow by the statute 12 Car. II, C. 24, 1660, which enacts, "that the court of wards and liveries, and all wardships, liveries, primer seisins, and *ouster le mains*, values and forfeitures of marriage, by reason of any tenure of the king or others, be totally taken away. And that all fines for alienation, tenures by homage, knights' service, and escuage, and also aids for marrying the daughter or knighting the son, and all tenures of the king *in capite*, be likewise taken away. And that all sorts of tenures, held of the king or others, be turned into free and common socage; save only tenures in frankalmoigne, copyhold and the honorary services of grand serjeanty." A statute, which was a greater acquisition to the civil property of this kingdom than even Magna Charta itself, since that only pruned the luxuriances that had grown out of the military tenures and thereby preserved them in full vigor; but the statute of King Charles extirpated the whole, and demolished both root and branches.

D[1]

At the first introduction of feuds, as they were gratuitous so also they were precarious and held at the *will* of the lord, who was then the

[1] *Ibid.*, pp. 55–58.

sole judge whether his vassal performed his services faithfully. Then they became certain for one or more years. Among the ancient Germans they continued only from year to year, an annual distribution of lands being made by their leaders in their general councils or assemblies. This was professedly done, lest their thoughts should be diverted from war to agriculture; lest the strong should encroach upon the possessions of the weak; and lest luxury and avarice should be encouraged by the erection of permanent houses, and too curious an attention to convenience and the elegant superfluities of life. But, when the general migration was pretty well over, and a peaceable possession of the new-acquired settlements had introduced new customs and manners, when the fertility of the soil had encouraged the study of husbandry, and an affection for the spots they had cultivated began naturally to arise in the tillers, a more permanent degree of property was introduced, and feuds began now to be granted for the *life* of the feudatory. But still feuds were not yet *hereditary*, though frequently granted, by the favor of the lord, to the children of the former possessor till in process of time it became unusual, and was therefore thought hard, to reject the heir if he were capable to perform the services—and therefore infants, women, and professed monks who were incapable of bearing arms were also incapable of succeeding to a genuine feud. But the heir, when admitted to the feud which his ancestor possessed, used generally to pay a fine or acknowledgment to the lord, in horses, arms, money, and the like, for such renewal of the feud, which was called a relief because it re-established the inheritance, or in the words of the feudal writers "*incertam et caducam hereditatem relevabat.*" This relief was afterward, when feuds became absolutely hereditary, continued on the death of the tenant, though the original foundation of it had ceased.

But in process of time feuds came by degrees to be universally extended beyond the life of the first vassal to his sons, or perhaps to such one of them as the lord should name; and in this case the form of the donation was strictly observed, for if a feud was given to a man and his sons all his sons succeeded him in equal portions, and as they died off their shares reverted to the lord, and, if not, descended to their children, or even to their surviving brothers, as not being specified in the donation. But when such a feud was given to a man and his *heirs* in general terms, then a more extended rule of succession took place; and when a feudatory died, his male descendants *in infinitum* were admitted to the succession. When any such descendant, who thus

had succeeded, died, his male descendants were also admitted in the first place, and, in defect of them, such of his male collateral kindred as were of the blood or lineage of the first feudatory, but no others. For this was an unalterable maxim in feudal succession, that "none was capable of inheriting a feud but such as was of the blood of, that is lineally descended from, the first feudatory." And the descent, being thus confined to males, originally extended to all the males alike, all the sons, without any distinction of primogeniture, succeeding to equal portions of the father's feud. But this being found upon many accounts inconvenient (particularly by dividing the services, and thereby weakening the strength of the feudal union) and *honorary* feuds (or titles of nobility) being now introduced, which were not of a divisible nature but could be inherited only by the eldest son, in imitation of these, *military* feuds (or those we are now describing) began also in most countries to descend according to the same rule of primogeniture, to the eldest son in exclusion of all the rest.

Other qualities of feuds were that the feudatory could not alien or dispose of his feud; neither could he exchange, nor yet mortgage, nor even devise it by will, without the consent of the lord. For, the reason of conferring the feud being the personal abilities of the feudatory to serve in war, it was not fit he should be at liberty to transfer this gift, either from himself or from his posterity, who were presumed to inherit his valor, to others who might prove less able. And, as the feudal obligation was looked upon as reciprocal, the feudatory being entitled to the lord's protection in return for his own fealty and service; therefore the lord could no more transfer his seigniory or protection without consent of his vassal, it being equally unreasonable that the lord should extend his protection to a person to whom he had exceptions, and that the vassal should owe subjection to a superior not of his own choosing.

These were the principal and very simple qualities of the genuine or original feuds which were all of a military nature, and in the hands of military persons: though the feudatories, being under frequent incapacities of cultivating and manuring their own lands, soon found it necessary to commit part of them to inferior tenants; obliging them to such returns in service, corn, cattle, or money, as might enable the chief feudatories to attend thir military duties without distraction, which returns, or *reditus*, were the original of rents. And by these means the feudal polity was greatly extended, these inferior feudatories being under similar obligations of fealty, to do suit of court, to

answer the stipulated renders or rent service, and to promote the welfare of their immediate superiors or lords.

But this at the same time demolished the ancient simplicity of feuds, and an inroad being once made upon their constitution, it subjected them, in a course of time, to great varieties and innovations. Feuds began to be bought and sold, and deviations were made from the old fundamental rules of tenure and succession, which were held no longer sacred, when the feuds themselves no longer continued to be purely military.

E[1]

A conditional fee at the common law was a fee restrained to some particular heirs, exclusive of others "*donatio, stricta et coarctata; sicut certis haeredibus quibusdam a successione exclusis,*" as to the heirs of a *man's body*, by which only his lineal descendants were admitted in exclusion of collateral heirs, or to the heirs *male of his body* in exclusion both of collaterals and lineal females also. It was called a conditional fee, by reason of the condition expressed or implied in the donation of it, that if the donee died without such particular heirs, the land should revert to the donor. For this was a condition annexed by law to all grants whatsoever, that, on failure of the heirs specified in the grant, the grant should be at an end, and the land return to its ancient proprietor. Such conditional fees were strictly agreeable to the nature of feuds, when they first ceased to be mere estate for life, and were not yet arrived to be absolute estates in fee simple. And we find strong traces of these limited, conditional fees, which could not be alienated from the lineage of the first purchaser in our earliest Saxon laws.

Now, with regard to the condition annexed to these fees by the common law, our ancestors held that such a gift (to a man and the heirs of his body) was a gift upon condition that it should revert to the donor, if the donee had no heirs of his body, but if he had it should then remain to the donee. They therefore called it a fee simple, on condition that he had issue. Now, we must observe that when any condition is performed it is thenceforth entirely gone, and the thing to which it was before annexed becomes absolute and wholly unconditional. So that as soon as the grantee had any issue born his estate was supposed to become absolute by the performance of the condition, at least, for these three purposes: (1) to enable the tenant to alien the land, and thereby to bar not only his own issue but also

[1] 2 Blackstone, *op. cit.*, pp. 110–12, 116–19.

the donor of his interest in the reversion; (2) to subject him to forfeit it for treason, which he could not do till issue born, longer than for his own life, lest thereby the inheritance of the issue and reversion of the donor might have been defeated; (3) to empower him to charge the land with rents, commons, and certain other encumbrance, so as to bind his issue. And this was thought the more reasonable because by the birth of issue the possibility of the donor's reversion was rendered more distant and precarious, and *his* interest seems to have been the only one which the law, as it then stood, was solicitous to protect, without much regard to the right of succession intended to be vested in the issue. However, if the tenant did not in fact alien the land, the course of descent was not altered by this performance of the condition, for if the issue had afterward died and then the tenant, or original grantee, had died without making any alienation, the land, by the terms of the donation, could descend to none but the heirs *of his body*, and, therefore, in default of them must have reverted to the donor. For which reason, in order to subject the lands to the ordinary course of descent, the donees of these conditional fee simples took care to alien as soon as they had performed the condition by having issue; and afterwards repurchased the lands, which gave them a fee simple absolute, that would descend to the heirs general, according to the course of the common law. And thus stood the old law with regard to conditional fees, which things, says Sir Edward Coke, though they seem ancient are yet necessary to be known, as well for the declaring how the common law stood in such cases, as for the sake of annuities, and such like inheritances as are not within the statutes of entail and and therefore remain as at the common law.

The inconveniences which attended these limited and fettered inheritances were probably what induced the judges to give to this subtle finesse of construction (for such it undoubtedly was) in order to shorten the duration of these conditional estates. But, on the other hand, the nobility, who were willing to perpetuate their possessions in their own families, to put a stop to this practice, procured the statute of Westminster the Second (commonly called the statute *de donis conditionalibus*) to be made, which paid a greater regard to the private will and intentions of the donor than to the propriety of such intentions or any public considerations whatsoever. This statute revived in some sort the ancient feudal restraints which were originally laid on alienations by enacting that from thenceforth the will of the donor be observed, and that the tenements so given (to a

man and the heirs of his body) should at all events go to the issue, if there were any, or if none, should revert to the donor.

About two hundred years intervened between the making of the statute *de donis* (1285) and the application of common recoveries to this intent, in the twelfth year of Edward IV (1472), which were then openly declared by the judges to be a sufficient bar of an estate tail. For though the courts had, so long before as the reign of Edward III (1326–1377), very frequently hinted their opinion that a bar might be effected upon these principles, yet it never was carried into execution till Edward IV, observing (in the disputes between the houses of York and Lancaster) how little effect attainders for treason had on families, whose estates were protected by the sanctuary of entails, gave his countenance to this proceeding, wherein, in consequence of the principles then laid down, it was in effect determined that a common recovery suffered by tenant in tail should be an effectual destruction thereof. What common recoveries are, both in their nature and consequences, and why they are allowed to be a bar to the estate tail, must be reserved to a subsequent inquiry. At present I shall only say that they are fictitious proceedings, introduced by a kind of *pia fraus* to elude the statute *de donis* which was found so intolerably mischievous and which yet one branch of the legislature would not then consent to repeal, and that these recoveries, however clandestinely begun, are now become by long use and acquiescence a most common assurance of lands and are looked upon as the legal mode of conveyance by which tenant in tail may dispose of his lands and tenements, so that no court will suffer them to be shaken or reflected on, and even acts of parliament have by a sidewind countenanced and established them.

The next attack which they suffered in order of time was by the statute 32 Hen. VIII, C. 28, whereby certain leases made by tenants in tail, which do not tend to the prejudice of the issue, were allowed to be good in law, and to bind the issue in tail. But they received a more violent blow in the same session of parliament by the construction put upon the statute of fines, by the statute of 32 Hen. VIII, C. 36 which declares a fine duly levied by tenant in tail to be a complete bar to him and his heirs and all other persons claiming under such entail. This was evidently agreeable to the intention of Henry VII, whose policy it was (before common recoveries had obtained their full strength and authority) to lay the road as open as possible to the alienation of landed property, in order to weaken the overgrown power of

his nobles. But as they from the opposite reasons were not easily brought to consent to such a provision, it was therefore couched, in his act, under covert and obscure expressions. And the judges, though willing to construe that statute as favorably as possible for the defeating of entailed estates, yet hesitated at giving fines so extensive a power by mere implication, when the statute *de donis* had expressly declared that they should *not* be a bar to estates tail. But the statute of Henry VIII, when the doctrine of alienation was better received, and the will of the prince more implicitly obeyed than before, avowed and established that intention.

F[1]

In the early times of our legal constitution the king's greater barons, who had a large extent of territory held under the crown, granted out frequently smaller manors to inferior persons to be holden of themselves, which do therefore now continue to be held under a superior lord who is called in such cases the lord paramount over all these manors, and his seigniory is frequently termed an honour, not a manor, especially if it hath belonged to an ancient feudal baron or hath been at any time in the hands of the crown. In imitation whereof these inferior lords began to carve out and grant to others still more minute estates, to be held as of themselves, and were so proceeding downward *in infinitum*, till the superior lords observed that by this process of subinfeudation they lost all their feudal profits of wardships, marriages, and escheats, which fell into the hands of these mesne or middle lords, who were the immediate superiors of the *terre-tenant*, or him who occupied the land, and also that the mesne lords themselves were so impoverished thereby that they were disabled from performing their services to their own superiors. This occasioned first, that provision in the thirty-second chapter of Magna Charta 9 Hen. III (which is not to be found in the first charter granted by that prince nor in the great charter of King John) that no man should either give or sell his land without reserving sufficient to answer the demand of his lord; and, afterward the statute of Westm. 3 or *quia emptores*, 18 Edw. I. c. 1. (1290) which directs that upon all sales or feoffments of land the feoffee shall hold the same, not of his immediate feoffor, but of the chief lord of the fee, of whom such feoffor himself held it. But these provisions, not extending to the king's own tenants, *in capite*, the like law concerning them is declared by the statutes of

[1] 2 Blackstone, *op. cit.*, pp. 91–92.

prerogativa regis, 17 Edw. II, c. 6. and of 34 Edw. III. c. 15. by which all subinfeudations, previous to the reign of King Edward I, were confirmed, but all subsequent to that period were left open to the king's prerogative. And from hence it is clear that all manors existing at this day must have existed as early as King Edward the first, for it is essential to a manor that there be tenants who hold of the lord, and, by the operation of these statutes, no tenant *in capite* since the accession of that prince, and no tenant of a common lord since the statute of *quia emptores*, could create any new tenants to hold of himself.

QUESTIONS

1. What was the *feudal system?* Where did it originate? When? What conditions made its organization possible?
2. "If we go back to the eleventh century, we find a body of law in England which William the Conqueror is said to have promulgated, but with which in truth he had very little to do, for it was an effect of causes which, among other phenomena, produced William himself. The feudal system sprang from the economic necessities of medieval Europe." What is meant by this statement? What were the economic necessities of medieval Europe?
3. What was the *manor?* What was its relation to the feudal system? Describe the layout of a typical manor. What classes of persons would be found on a manor? What were some of the social and economic characteristics of the manorial organization?
4. What is meant by *tenure?* What types of tenure were represented in the feudal organization? Name the outstanding characteristics of each.
5. What is meant by incidents of tenure? Set out and discuss briefly the incidents of each tenure.
6. What forces caused the disintegration of the manorial organization? When did they begin to operate?
7. What was the effect of the statute of 12 Car. II, *c* 24, 1660? What forces caused its enactment? How long had these forces been operative? How do you account for the fact that this statute was not passed even earlier?
8. After the enactment of the foregoing statute did tenure continue in England? If so, what types continued? Is there tenure in England at the present time?
9. Did the feudal system ever get a foothold in the American colonies? Do we have such a thing as tenure in this country?
10. "At the outset, you find champions settling their differences by duels or by private wars. Subsequently a new form of intelligence appears,

using money as a weapon. The moneyed men buy exemption from the feudal customs which favor the soldier, and establish courts to favor themselves, whose decrees are enforced by hired police." Comment on the foregoing statement.

11. It is said that order came in England only with the rise of the moneyed class, merchants and traders. When did this moneyed class arise? How did their rise contribute to the bringing about of order in England?
12. What is meant by a fee simple estate? What is the origin of this estate? Trace the steps by which land became alienable.
13. What external forces in England made for the alienability of land? What forces arising out of the feudal system stood out against the development of free alienability of land?
14. What was the purpose of the statute *quia emptores?* Who procured its passage? What were its effects?
15. State the rule in *Shelley's Case.* How does the rule operate?
16. It has been said that the rule in *Shelley's Case* was designed in the interest of alienability and to make an ancestor's property available for the payment of his debts. Do you agree with the statement? In any case, how could it have the effect alleged?
17. "There was a constant struggle going on between the lords and the tenants in regard to freedom of alienation of land. Especially, after the decision in *Shelley's Case*, were the lords anxious to devise some method by which they could check alienation of holdings by their tenants. So they fell upon a scheme of conveying in this manner: To A and the heirs of his body." (*a*) Were the lords successful in their attempts to check alienation by the tenants by the device referred to? (*b*) What construction did the courts place upon the grant mentioned in the foregoing quotation?
18. What was the statute *de donis conditionalibus?* In favor of what class of persons was it passed? Was its object accomplished?
19. In what ways was the statute *de donis* evaded? How do you explain the fact that these evasions were permitted?

ii. IN EQUITY

A

In addition to the legal ownership in land a new and different ownership arose, recognized only in courts of equity. And so it came about that one person might be regarded as owner of land by courts of law; and another might be regarded as its owner by courts of equity. This distinction between legal ownership and equitable ownership, developing at a relatively early time, still continues in our law and deserves attention in this connection.

The origin and growth of this equitable ownership was due in large measure to the feudal system of landholding in England. In the beginning the king parcelled out all the land among his chief lords; these lords, in turn, made lesser divisions of the land to their followers, and so on down to the tenants who actually occupied and used the soil. Between each grantor and grantee in this hierarchy there existed a relation which in the feudal law was known as *tenure*. Incident to this relation there were feudal dues and services of many kinds to be performed by the tenants. In time these dues and services became very irksome and oppressive. There were certain classes of persons such as infants, women, and religious houses which were not admitted to the estates of their ancestors or grantors, because they were not able to perform the feudal dues and services demanded of them. As yet, tenants, though keenly desiring it, did not possess the power to make testamentary disposition of their ownership in lands. Mortmain legislation had been passed, depriving churches and religious institutions of their privilege of taking lands freely by conveyances. Moreover, England was fast ceasing to be a military and agricultural nation; trade and commerce had begun to play an important part in the lives of the people; and such a system of landholding was wholly out of harmony with the growing needs of the times. It was perfectly natural, therefore, under all these circumstances, that tenants of land should seek devices by which they might evade the burdens and inconveniences of the existing law. The expedient which was adopted and which, in different form, continues in our law until the present time, was the *use* in land.

"The *use of lands* was, originally, a device for enjoying the benefits of landownership without incurring any of its legal responsibilities." X, wishing to transfer his interest or ownership in land to C, would enfeoff T, known as the *feoffee to uses*, to the *use* of C, known as the *cestui que use*. The effect of this transaction was to transfer X's seisin (possession which carried with it the feudal dues and services) to T, with the understanding that T should collect the rents and profits from the land and account to the *cestui que use* for them. The *feoffee to uses*, having the seisin, i.e, the legal ownership, was the only person recognized by law and, therefore, the person responsible for the performance of all feudal dues. The *cestui que use* was thus able to enjoy the benefits of ownership and yet was an utter stranger to the law so far as his obligation to perform feudal services was concerned. By this device, the ownership and transfer of lands were relieved of

many irksome burdens; infants and women were able to come into their estates and enjoy them; the risk of forfeiting one's estate for treason was greatly reduced; tenants were able to make testamentary disposition of their property; and religious houses were able to hold land notwithstanding mortmain legislation.

In the beginning the interest of the *cestui que use* in the land was undoubtedly very precarious. The value of his interest depended upon the honesty of the *feoffee to uses*. The courts of law did not recognize the *cestui que use* nor did they recognize his interest in the estate; consequently, the *cestui que use* would not have been heeded by the law of courts even if he were able to show that the *feoffee to uses* was misusing the estate or misappropriating the rents and profits from it. But in time, the complaint of the *cestui que use* that the *feoffee to uses* was committing a breach of trust and confidence reached the ears of the chancellor, the keeper of the Great Seal and of the king's conscience, and in him the *cestui que use* found a true friend. The chancellor, in the beginning, was usually a high churchman and was, therefore, interested in seeing that religious houses should get their just dues; moreover, it was coming to be recognized that one of the special duties of the chancellor was to grant relief where the courts of common law granted none. What was more natural, therefore, than that the chancellor should exercise his special power in favor of the *cestui que use* and issue his powerful writ, the *subpoena*, against the wicked *feoffee to uses*, commanding him under penalty to answer faithfully and to account fully to the *cestui que use* for the rents and profits of the estate?

In the beginning, the chancellor protected the *cestui que trust* only against the *feoffee to uses*. The *feoffee's* conscience was alone bound to fulfill the trust and confidence reposed in him by the grantor. Should the feoffee be permitted to discharge the land of the *use* by transferring the legal title to some third person? It must be remembered that the feoffee had the legal title and it was only from him that the legal title could pass to anyone. In the course of time the chancellor came to protect the *cestui que use* against everyone who took the legal title from the *feoffee*, except against a bona fide purchaser. If the feoffee died, the legal title to the estate naturally passed to his heir; but the chancellor said that the heir should hold the estate subject to the same *use* to which it had been subject in the hands of his ancestor. If the *feoffee to uses* transferred the estate to a donee, at law the title passed to the transferee; but the chancellor decreed that the donee

took the estate subject to the equities of the *cestui.* If the feoffee sold the estate, title at law passed to the purchaser even though he had notice of the interest of the *cestui;* but the chancellor was of the opinion that his legal title deserved no protection because he bought it in bad faith. The chancellor, however, refused to extend his protection to the *cestui que use* when the estate was transferred to a purchaser for value without notice of the *use.* The fact that the purchaser had paid value for the legal title without notice was so important that the chancellor, even if he had wished to do so, could hardly have dared to interpose his power on behalf of the *cestui que use.* Accordingly, it came about that the purchaser in good faith of a legal title took it free of the equities of the *cestui que trust.*

B[1]

The inroads which uses had made, and were still making upon the ancient law of tenure, at length induced the legislature to pass the famous Statute of Uses (1535) from which we date a new era in the history of conveyancing. That statute, after setting forth a long catalogue of "imaginations," "inventions," and "practices," whereby "many inconveniences had happened and daily did increase, among the king's subjects, to their great trouble and inquietness, and to the utter subversion of the ancient common laws of the realm," enacted, "for the extirpating and extinguishment of all such subtle practiced abuses," that, "where any person or persons stood, or were seised, or thereafter should be seised, of any hereditaments to the use of any other person or persons, such person and persons that had, or thereafter should have, such use, or any use, in remainder or reverter, should thenceforth be adjudged in lawful seisin, estate, and possession of and in the same hereditaments to all intents of and in such like estates as they had, or should have in use of and in the same, and that the estate, title, right, and possession that was in such person, or persons, that were, or thereafter should be seised to the use of any such person or persons, be adjudged to be in him or them that had or thereafter should have such use, after such quality, manner, form, and condition as they had before in or to the use." The substance and effect of this enactment was, that where any person should be seised of land to the use of any other person, the person entitled to the use in equity should be deemed to have a corresponding estate or interest in the land at law.

[1] From 1 Hayes, *Conveyancing* (5th ed.), pp. 48–49.

C[1]

The apparent object of the statute was, by turning uses into direct ownerships of the land itself, to prevent the future separation of the beneficial right from the legal estate, and thus to restore, in some degree, the singleness and simplicity of the common law. Lord Coke, however, says with his characteristic quaintness, that "the makers of the statute at last resolved, that uses were so subtle and perverse that they could by no policy or provision be governed or reformed; and therefore, as a skilful gardener will not cut away the leaves of the weeds, but extirpate them by the roots; and as a wise householder will not cover or stir up the fire which is secretly kindled in his house, but utterly put it out; so the makers of the said statute did not intend to provide a remedy and reformation by the continuance of preservation, but by the extinction and extirpation of uses; and because uses were so subtle and ungovernable, as hath been said, they have, with an indissoluble knot, coupled and married them to the land, which, of all the elements, is the most ponderous and immovable."

Whether the statute-makers, blind to the folly of attempting to reimpose upon the people, who had begun to taste of freedom in the enjoyment and disposal of their possessions, the feudal fetters of the ancient law, really aimed, without mitigating the rigor of that law, at the utter annihilation of uses, or whether they sought only to bring all interests in land under the cognizance of the court of law, without disturbing the new modes and forms of disposition which uses had introduced, their elaborate piece of legislation must be pronounced a signal failure. The statute, however, though it miscarried in regard to both these objects, was not inactive, but produced important and lasting results, which, as they are of the very essence of the modern system, demand attentive consideration. Of those coming changes, the legislature (which, as the late learned Chief Justice of the King's Bench happily observed, is not *inops consilii*, but rather *magnas inter opes inops*) had probably no presentiment.

The statute did *not* operate to prevent the future existence of equitable rights, as distinct from the legal ownership, while it did operate to communicate to the legal ownership all the flexible and most of the popular qualities of the use; contributing, therefore, both by its negative and positive effect, to confirm and extend the long-coveted immunity from feudal strictness.

[1] *Ibid.*, pp. 49–54.

As the retention of equitable interests determined the character of the future system, let us first advert to the means by which they were preserved.

As to leaseholds for years, they were adjudged to be excluded by the letter of the statute. If land was vested in A for a term of years, *to the use* of B, the statute was held not to transfer the legal interest in the term to B, because, as it should seem, the statute, when it speaks of persons *seised* to the use of others, must, according to correct technical phraseology, be understood to speak of a *freeholder* who is *seised*, and not of a leaseholder who is merely *possessed;* yet the statute is commonly described as a statute "made for transferring uses into *possession*," or for uniting the *possession* to the use. Another ground assigned for the non-application of the statute to leaseholds for years, is, that, before the statute, equity would not have enforced a use in respect of a term of years, inasmuch as chattel interests were anciently held in small estimation; and that, consequently, in regard to this species of property, there were no uses to be transferred into possession. As the statute, for reasons which have now lost their force, was confined in construction to conveyances by freehold tenants, the term of years remained in A, at law, and B's use underwent no change, except a change of name, for it was now called, in conformity with the style adopted in regard to freehold equitable interests, of which we are about to speak, a *trust.*

As to freeholds, uses of a certain description were excluded by their intrinsic nature. The only uses on which the statute could operate were passive uses and resulting uses (which, except so far as regards the manner of their creation, may be classed together)—uses not imposing any duty to be discharged by the legal owner, nor indicating any purpose to be answered by the separation of the legal ownership from the beneficial ownership. Such equitable interests the legislature unquestionably meant to extirpate. But in regard to active uses and constructive uses, the statute was necessarily inoperative. When the use involved a direction to sell and divide the money or to pay debts or to convey to a child when adult or to reconvey on satisfaction of a mortgage, which might never be satisfied, the very nature of the use seemed to preclude the possibility of its being converted, by force of the statute, into a legal right to the land. For the convenience of carrying such destinations into effect, the legal estate still resided in the trustee, and courts of equity continued to administer the trust:—though it may be matter of speculative inquiry whether

such was the inevitable result, even in regard to uses of that class—, whether legal powers over the lands exactly commensurate with the scope of the office to be discharged, might not have been substituted for the legal estate, or why law and equity might not have been so far reconciled as to confine the legal dominion of the trustee, which often survives at law the purpose of its creation (rendering a reconveyance necessary), within the limits of that purpose.

But the judicature established a yet more extensive and important exception by the rigid construction put, in one respect, upon the language of the party declaring the use. The statute aimed at rendering innoxious, by turning the use into a legal estate, the confidence in the person into a direct right in the land. It annexed to the use the actual possession of the subject; not prohibiting or restricting the creation of uses, but only operating upon the use when created. Now, the judges thought fit to determine that if A, the legal owner of the land, was directed to hold, or contracted to hold, the land to the use of B, who at the same time was directed to hold, or contracted to hold, it to the use of C, the statute would carry the land to B, but carry it no farther, however plainly the intention might appear that the use or benefit was really designed for C, who was, therefore, left to enforce his right to a conveyance and an account of the profits by a suit in equity against B, with whom the legal possession rested. The ultimate use in favor of C was said to be a use upon a use, which the statute, having exhausted itself in the act of communicating the properties of a legal estate to the use in favor of B, had not remaining energy to reach.

Hence the line of demarcation between the legal and equitable ownership was drawn as broadly and as strongly as ever. In order to create, after the passing of the statute, an interest purely equitable, nothing more was necessary than to declare a second use; the statute added, as Lord Hardwicke observed, three words (*to the use*) to a conveyance.

So that, by a very ready process, the legal estate might still be separated from the equitable or usufructuary right. The things remained; the terms only were ordinarily changed. The primary use, on which the statute did operate, retained, along with its new character of a legal estate, its ancient appellation of a *use;* but the secondary use, on which the statute did not operate, was commonly called, for distinction's sake, a *trust*.

QUESTIONS

1. What causes led to the development of an equitable ownership in land? Is such an ownership in land still recognized in our law?
2. What circumstances made it possible for the chancellor to recognize and enforce the new equitable estates? Why were they not recognized and enforced by the church courts?
3. How was a use in land created? What formalities were necessary to the creation of the use estate?
4. F holds land to the use of C. (*a*) Who is responsible for the feudal dues incident to the ownership of the land? (*b*) Who can bring and defend actions relating to the land? (*c*) Who is entitled to the rents and profits arising from the estate? (*d*) Who has the legal title to the land?
5. X enfeoffs F to the use of C and his heirs. (*a*) F dies and the title to the land descends to H, his heir at law. (*b*) F gives the land to D. (*c*) F sells the land to M, who has knowledge of the use. (*d*) F sells the land to B, who pays value therefore without notice of C's use. (i) What are the rights of C in each case in the courts of common law? (ii) What are his rights in each case in a court of equity?
6. What rules did the chancellor follow in determining the *quantum* of interest in the land to which the *cestui que use* was entitled?
7. Who could be a *feoffee to uses*? Could a corporation hold land in use for another? Could an alien?
8. When was the Statute of Uses passed? What was the object of this statute? How well was the object accomplished?
9. In the following cases, point out the effect of the conveyance before and after the passage of the Statute of Uses: (*a*) X enfeoffs F to the use of C and his heirs. (*b*) X enfeoffs F for life to the use of C for life. (*c*) X enfeoffs F to the use of C for ninety-nine years. (*d*) X leases Blackacre to F for ten years to the use of C for ten years. (*e*) X enfeoffs F to the use of C and his heirs, to pay the income to C during minority, and to convey the estate to C, upon the attainment of his majority. (*f*) X enfeoffs F to the use of B and his heirs, to the use of C and his heirs.
10. Did courts of equity extend the doctrine of equitable ownership to personal property?
11. What is the relation of the modern law of trusts to the old law of uses?

b) Estates in Land

i. NATURE AND CHARACTERISTICS OF ESTATES

A[1]

Tenant in fee simple (or, as he is frequently styled, tenant in fee) is he that hath lands, tenements, or hereditaments to hold to him and his heirs forever, generally, absolutely, and simply, without mentioning *what* heirs, but referring that to his own pleasure, or to the disposition of the law. The true meaning of the word "fee" (*feodum*) is the same with that of feud or fief, and in its original sense it is taken in contradistinction to *allodium*, which latter the writers on this subject define to be every man's own land, which he possesseth merely in his own right, without owing any rent or service to any superior. This is property in its highest degree, and the owner thereof hath *absolutum et directum dominium*, and therefore is said to be seised thereof absolutely *in dominico suo*. But *feodum* is that which is held of some superior, on condition of rendering him service, in which superior the ultimate property of the land resides. And therefore Sir Henry Spelman defines a feud or fee to be the right which the vassal or tenant hath in lands, to use the same, and take the profits thereof to him and his heirs, rendering to the lord his due services; the mere allodial *property* of the soil always remaining in the lord. This allodial property no subject in England has, it being a received, and now undeniable, principle in the law that all the lands in England are holden mediately or immediately of the king. The king, therefore, only hath *absolutum et directum dominium*, but all the subjects' lands are in the nature of *feodum* or fee, whether derived to them by descent from their ancestors or purchased for a valuable consideration—for they cannot come to any man by either of those ways unless accompanied with those feudal clogs which were laid upon the first feudatory, when it was originally granted. A subject, therefore, hath only the usufruct, and not the absolute property of the soil; or, as Sir Edward Coke expresses it, he hath *dominium utile* but not *dominium directum*. And hence it is that, in the most solemn acts of law, we express the strongest and highest estate that any subject can have by these words: "he is seised thereof *in his demesne as of fee.*" It is a man's demesne, *dominicum*, since it belongs to him and his heirs forever; yet this *dominicum*, property, or demesne, is strictly not absolute or allodial but qualified or feudal; it is his demesne, *as of fee;*

[1] 2 Blackstone, *op. cit.*, pp. 104–7.

that is, it is not purely and simply his own, since it is held of a superior lord in whom the ultimate property resides.

This is the primary sense and acceptation of the word *fee*. But (as Sir Martin Wright very justly observes) the doctrine, "that all lands are holden," having been for so many ages a fixed and undeniable axiom, our English lawyers do very rarely (of late years especially) use the word *fee* in this its primary original sense, in contradistinction to *allodium* or absolute property, with which they have no concern; but generally use it to express the continuance of quantity of estate. A *fee*, therefore, in general signifies an estate of inheritance, being the highest and most extensive interest that a man can have in a feud: and when the term is used simply, without any other adjunct, or has the adjunct of *simple* annexed to it (as a fee, or a fee simple) it is used in contradistinction to a fee conditional at the common law, or a fee tail by the statute, importing an absolute inheritance clear of any condition, limitation, or restrictions to particular heirs, but descendible to the heirs general, whether male or female, lineal or collateral. And in no other sense than this is the king said to be seised in fee, he being the feudatory of no man.

Taking, therefore, *fee* for the future, unless where otherwise explained, in this its secondary sense as a state of inheritance, it is applicable to, and may be had in, any kind of hereditaments either corporeal or incorporeal. But there is this distinction between the two species of hereditaments, that of a corporeal inheritance a man shall be said to be seised *in his demesne, as of fee*, of an incorporeal one he shall only be said to be seised *as of fee* and not in his demesne. For, as incorporeal hereditaments are in their nature collateral to, and issue out of, lands and houses, their owner hath no property, *dominicum*, or demesne in the *thing* itself, but hath only something derived out of it, resembling the *servitutes*, or services, of the civil law. The *dominicum* or property is frequently in one man, while the appendage or service is in another. Thus Gaius may be seised *as of fee*, of a way going over land, of which Titius is seised *in his demesne as of fee*.

B[1]

The word *heirs* is necessary in the grant or donation, in order to make a fee or inheritance. For if land be given to a man forever, or to him and his assigns forever, this vests in him but an estate for life. This very great nicety about the insertion of the word "heirs" in all feoffments and grants, in order to vest a fee, is plainly a relic of the

[1] 2 Blackstone, *op. cit.*, pp. 107–9.

feudal strictness, by which we may remember it was required that the form of the donation should be punctually pursued. And therefore, as the personal abilities of the donee were originally supposed to be the only inducements to the gift, the donee's estate in the land extended only to his own person, and subsisted no longer than his life, unless the donor by an express provision in the grant gave it a longer continuance and extended it also to his heirs. But this rule is now softened by many exceptions.

For, (1) it does not extend to devises by will in which, as they were introduced at the time when the feudal rigor was apace wearing out, a more liberal construction is allowed, and therefore by a devise to a man forever or to one and his assigns forever or to one in fee simple, the devisee hath an estate of inheritance; for the intention of the devisor is sufficiently plain from the words of perpetuity annexed, though he hath omitted the legal words of inheritance. But if the devise be to a man and his assigns, without annexing words of perpetuity, there the devisee shall take only an estate for life, for it does not appear that the devisor intended any more. (2) Neither does this rule extend to fines or recoveries considered as a species of conveyance; for thereby an estate in fee passes by act and operation of law without the word "heirs" as it does also, for particular reasons, by certain other methods of conveyance, which have relation to a former grant or estate, wherein the word "heirs" was expressed. (3) In grants of land to sole corporations and their successors, the word "successors" supplies the place of "heirs," for as heirs take from the ancestor, so doth the successor from the predecessor. But, in a grant of lands to a corporation aggregate, the word "successors" is not necessary, though usually inserted, for, albeit such simple grant be strictly only an estate for life, yet, as that corporation never dies, such estate for life is perpetual or equivalent to a fee simple, and therefore the law allows it to be one. (4) Lastly, in the case of the king, a fee simple will vest in him, without the word "heirs" or "successors" in the grant, partly from prerogative royal and partly from a reason similar to the last, because the king in the judgment of the law never dies. But the general rule is, that the word "heirs" is necessary to create an estate of inheritance.

C[1]

The rule in *Shelley's case* (1 Co. R. 93 *b*) says, in substance, that if an estate of *freehold* be limited to A, with *remainder* to his heirs,

[1] Hayes, *op. cit.*, pp. 542–44.

general or special, the remainder, although importing an independent gift to the heirs as original takers, shall confer the inheritance on A, the ancestor.

The rule assumes and founds itself upon two pre-existing circumstances—a freehold in the ancestor and a remainder to the heirs. The absence of either of these ingredients repels the application of the rule; their concurrence irresistibly invites it. When the rule supposes the second limitation to be a *remainder*, it plainly excludes: (1) the case of limitations differing in quality, the one being legal and the other being equitable; (2) the case of limitations arising under distinct assurances; and (3) the case of an *executory* limitation by way of devise or use, and consequently, upon principle, the case of a limitation arising under an appointment of the use; but authority seems to have established an anomalous exception in regard to appointments. Again, as the second limitation must be a remainder to the *heirs*, it follows, that, with limitations to *sons*, *children*, or other objects, to take, either as individuals or as a class, under what is termed a *descriptio personae*, as distinguished from a limitation embracing the line of inheritable succession, the rule has no concern whatever. In order to find whether the second limitation is a *remainder* to the *heirs* or not, we must resort to the general rules and principles of law. The rule being a maxim of legal policy, conversant with things and not with words, applies whenever judicial exposition determines that heirs are described, though informally, under a term correctly descriptive of other objects, but stands excluded whenever it determines that other objects are described, though informally, under the term *heirs*. Thus, even the word *children*, aided by the context, or the word *issue*, uncontrolled by the context, may have all the force of the word *heirs*, and then the rule applies; while the word *heirs*, restrained by the context, may have only the force of the word *children*, and then the rule is utterly irrelevant. These are preliminary questions, purely of construction, to be considered without any reference to the rule, and to be solved exclusively by the ordinary process of interpretation.

The operation of the rule is twofold: first, it denies to the remainder the effect of a gift to the *heirs;* secondly, it attributes to the remainder the effect of a gift to the *ancestor* himself. It is, therefore, clear that the rule not only defeats the intention, *but substitutes a legal intendment directly opposed to the obvious design of the limitation.* A rule which so operates cannot be a rule of construction. As a

consequence of transferring the benefit of the remainder from the heirs, who are unascertained, to the ancestor, who is ascertained, the inheritance, limited in contingency to the heirs, may become vested in the ancestor, and, as another consequence of the same process, the ancestor's estate may merge in the inheritance.

D[1]

There are some estates defeasible upon condition subsequent that require a more peculiar notice. Such are, estates held *in vadio*, in *gage*, or pledge; which are of two kinds, *vivium vadium*, or living pledge, and *mortuum vadium*, or *mortgage*.

Vivium vadium, or living pledge, is when a man borrows a sum (suppose £200) of another, and grants him an estate, as of £20 per annum, to hold till the rents and profits shall repay the sum so borrowed. This is an estate conditioned to be void as soon as such sum is raised. And in this case the land or pledge is said to be living; it subsists, and survives the debt, and immediately on the discharge of that, results back to the borrower. But *mortuum vadium*, a dead pledge or *mortgage* (which is much more common than the other) is where a man borrows of another a specific sum (e.g., £200) and grants him an estate in fee, on condition that if he, the mortgagor, shall repay the mortgagee the said sum of £200 on a certain day mentioned in the deed, that then the mortgagor may re-enter on the estate so granted in pledge; or, as is now the more usual way, that then the mortgagee shall reconvey the estate to the mortgagor—in this case, the land, which is so put in pledge, is by law in case of non-payment at the time limited forever dead and gone from the mortgagor, and the mortgagee's estate in the lands is then no longer conditional but absolute. But, so long as it continues conditional, that is, between the time of lending the money and the time allotted for payment, the mortgagee is called tenant in mortgage. But as it was formerly a doubt whether, by taking such estate in fee, it did not become liable to the wife's dower and other encumbrances of the mortgagee (though that doubt has been long ago overruled by our courts of equity), it therefore became usual to grant only a long term of years by way of mortgage, with condition to be void on repayment of the mortgage money, which course has been since pretty generally continued, principally because on the death of the mortgagee such term becomes vested in his personal representatives who alone are entitled in equity

[1] 2 Blackstone, *op. cit.*, pp. 157–60.

to receive the money lent, of whatever nature the mortgage happens to be.

As soon as the estate is created the mortgagee may immediately enter on the lands, but is liable to be dispossessed upon performance of the condition by payment of the mortgage money at the day limited. And therefore the usual way is to agree that the mortgagor shall hold the land till the day assigned for payment, when, in case of failure whereby the estate becomes absolute, the mortgagee may enter upon it and take possession, without any possibility at law of being afterward evicted by the mortgagor to whom the land is now forever dead. But here again the courts of equity interpose, and, though a mortgage be thus forfeited and the estate absolutely vested in the mortgagee at the common law, yet they will consider the real value of the tenements compared with the sum borrowed. And, if the estate be a greater value than the sum lent thereon, they will allow the mortgagor at any reasonable time to recall or redeem his estate, paying to the mortgagee his principal, interest, and expenses, for otherwise, in strictness of law, an estate worth £1,000 might be forfeited for non-payment of £100 or a less sum. This reasonable advantage allowed to mortgagors is called the *equity of redemption*, and this enables a mortgagor to call on the mortgagee, who has possession of his estate, to deliver it back and account for the rents and profits received on payment of his whole debt and interest, thereby turning the *mortuum* into a kind of *vivium vadium*. But on the other hand, the mortgagee may either compel the sale of the estate, in order to get the whole sum of his money immediately, or else call upon the mortgagor to redeem his estate presently, or, in default thereof, to be forever foreclosed from redeeming the same—that is, to lose his equity of redemption without possibility of recall.

E[1]

According to the laws of the state of New York then and still in force, a mortgage of real estate creates a mere chose in action, a pledge, a security for the debt. It conveys no title to the property. The claim of the mortgagee is a mere chattel interest. He has no right to possession of the property. The title and seisin remain in the mortgagor, and he can maintain trespass and ejectment against the mortgagee, if he takes possession of the property without the consent of the mortgagor. This appears clearly from the following cases.

[1] From the opinion of Park, C. J., *Chappell* v. *Jardine*, 51 Conn., 64.

In *Gardner* v. *Heartt*, 3 Denio, 232, the court says: "The mortgagee, as such, has no title to the land mortgaged; he has neither *jus in re* nor *ad rem*, but a mere security for his debt; the title to the land, notwithstanding the mortgage, remains in the mortgagor." In *Power* v. *Lester*, 23 N.Y., 527, the court says: "A mortgage is a mere security, an incumbrance upon the land. It gives the mortgagee no title or estate whatever. The mortgagor remains the owner, and may maintain trespass even against the mortgagee. A mortgage is but a chattel interest; it may be assigned by delivery, and cannot be seized and sold on execution." In *Trimm* v. *Marsh*, 54 N.Y., 599, the court says: "The common law rule still prevails in England. There the courts still hold that the legal title passes to the mortgagee, and becomes by default absolutely vested in him at law, and that the mortgagor has, after default, nothing but an equity of redemption to be enforced in a court of equity. After default the mortgagor can again become reinvested with the title to his land only by a reconveyance by the mortgagee. The same rule prevails in the New England states, and in many of the other states of the Union. But this common law rule has never, to its full extent, been adopted in this state. Here the mortgagor has, both in law and equity, been regarded as the owner of the fee, and the mortgage has been regarded as a mere chose in action, a mere security of a personal nature. At common law, payment or tender at the law day extinguished the lien of the mortgage and reinvested the mortgagor, without reconveyance by the mortgagee, with his title. But tender or payment after the law day did not have this effect, and in such cases a conveyance was necessary; and such is still the law in England, and of many of the states of the Union. But it has always been the law of this state that payment or tender, at any time after the mortgage debt became due and before foreclosure, destroyed the lien of the mortgagee and restored the mortgagor to his full title. As the mortgagee had no title, a reconveyance was not required by the law as expounded by our courts. So that here the term 'law day,' which occupies such a prominent place in the early decisions as to mortgages, has no particular significance. The mortgagor has his 'law day' until his title has been foreclosed by sale under the mortgage, and it is a misnomer in this state to call the mortgagor's right in the land, before or after default, an equity of redemption, a mere right to go into equity and redeem. This was a proper description of the mortgagor's right in the land according to the law as expounded in England. But in this state the

interest of the mortgagor in the land is the same before and after default, and is a legal title, with all the incidents and attributes of such an estate." See also *Jackson* v. *Willard*, 4 Johns., 42; *Astor* v. *Hoyt*, 5 Wend., 603; *Kortright* v. *Cady*, 23 N.Y., 343; *Merritt* v. *Bartholick*, 36 *id.*, 44.

F[1]

We are next to discourse of such estates of freehold as are not of inheritance, but for life only. And of these estates for life, some are *conventional* or expressly created by the acts of the parties, others merely *legal*, or created by construction and operation of law. We will consider them both in their order.

Estates for life, expressly created by deed or grant (which alone are properly conventional), are where a lease is made of lands or tenements to a man to hold for the term of his own life or for that of any other person, or for more lives, only, when he holds the estate by the life of another, he is usually called tenant *pur auter vie*. These estates for life are, like inheritances, of a feudal nature, and were, for some time, the highest estate that any man could have in a feud, which (as we have before seen) was not in its original hereditary. They are given or conferred by the same feudal rights and solemnities, the same investiture of livery of seisin, as fees themselves are, and they are held by fealty, if demanded, and such conventional rents and services as the lord or lessor and his tenant or lessee have agreed on.

Estates for life may be created, not only by the express words before mentioned, but also by a general grant, without defining or limiting any specific estate. As, if one grants to A B the manor of Dale, this makes him tenant for life. For though, as there are no words of inheritance *or heirs* mentioned in the grant, it cannot be construed to be a fee, it shall, however, be construed to be as large an estate as the words of the donation will bear, and therefore an estate for life. Also such a grant at large, or a grant for term of life generally, shall be construed to be an estate for the life *of the grantee*, in case the grantor hath authority to make such a grant; for an estate for a man's own life is more beneficial and of a higher nature than for any other life, and the rule of law is that all grants are to be taken most strongly against the grantor, unless in the case of the king.

Such estates for life will, generally speaking, endure as long as the life for which they are granted, but there are some estates for life

[1] 2 Blackstone, *op. cit.*, pp. 120–30.

which may determine upon future contingencies before the life for which they are created expires. As, if an estate be granted to a woman during her widowhood or to a man until he be promoted to a benefice, in these and similar cases, whenever the contingency happens, when the widow marries, or when the grantee obtains a benefice, the respective estates are absolutely determined and gone. Yet, while they subsist they are reckoned estates for life, because, the time for which they will endure being uncertain, they may possibly last for life, if the contingencies upon which they are to determine do not sooner happen. And, morover, in case an estate be granted to a man for his life, generally, it may also determine by his *civil* death—as if he enters into a monastery, whereby he is dead in law—for which reason in conveyances the grant is usually made "for the term of a man's *natural* life," which can only determine by his *natural* death.

The next estate for life is of the legal kind, as contradistinguished from conventional; viz., that of tenant *in tail after possibility of issue extinct*. This happens where one is tenant in special tail, and a person, from whose body the issue was to spring, dies without issue, or, having left issue, that issue becomes extinct—in either of these cases the surviving tenant in special tail becomes tenant in tail after possibility of issue extinct. As, where one has an estate to him and his heirs on the body of his present wife to be begotten, and the wife dies without issue, in this case the man has an estate tail, which cannot possibly descend to anyone, and therefore the law makes use of this long periphrasis, as absolutely necessary to give an adequate idea of his estate.

This estate must be created by the act of God, that is, by the death of that person out of whose body the issue was to spring, for no limitation, conveyance, or other human act can make it. For, if land be given to a man and his wife, and the heirs of their two bodies begotten, and they are divorced, *a vinculo matrimonii*, they shall neither of them have this estate, but be barely tenants for life, notwithstanding the inheritance once vested in them. A possibility of issue is always supposed to exist, in law, unless extinguished by the death of the parties, even though the donees be each of them a hundred years old.

This estate is of amphibious nature, partaking partly of an estate tail and partly of an estate for life. The tenant is, in truth, only tenant for life, but with many of the privileges of a tenant in tail, as, not to be punishable for waste, etc.; or, he is tenant in tail, with many of the restrictions of a tenant for life; as, to forfeit his estate if he

aliens it in fee simple; whereas such alienation by a tenant in tail, though voidable by the issue, is no forfeiture of the estate to the reversioner who is not concerned in interest, till all possibility of issue be extinct. But, in general, the law looks upon this estate as equivalent to an estate for life only, and, as such, will permit this tenant to exchange his estate with a tenant for life, which exchange can only be made, as we shall see hereafter, of estates that are equal in their nature.

Tenant *by the curtesy of England* is where a man marries a woman seised of lands and tenements in fee simple or fee tail; that is, of an estate of inheritance, and has by her issue, born alive, which was capable of inheriting her estate. In this case, he shall on the death of his wife hold the lands for his life as tenant by the curtesy of England.

This estate, according to Littleton, has its denomination because it is used within the realm of England only, and it is said in the *Mirror* to have been introduced by King Henry the First; but it appears also to have been the established law of Scotland, wherein it was called *curialitas*, so that probably our word "*curtesy*" was understood to signify rather an attendance upon the lord's *court* or *curtis* than to denote any peculiar favor belonging to this island. And therefore it is laid down that by having issue the husband shall be entitled to do homage to the lord for the wife's lands alone, whereas, before issue had they must both have done it together. It is likewise used in Ireland, by virtue of an ordinance of King Henry III. It also appears to have obtained in Normandy and was likewise used among the ancient Almains or Germans. And yet it is not generally apprehended to have been a consequence of feudal tenure, though I think some substantial feudal reasons may be given for its introduction. For, if a woman seised of lands have issue by her husband, and dies, the husband is the natural guardian of the child, and as such is in reason entitled to the profits of the lands in order to maintain it; and, therefore, the heir apparent of a tenant by the curtesy could not be in ward to the lord of the fee during the life of such tenant. As soon, therefore, as any child was born, the father began to have a permanent interest in the lands; he became one of the *pares curtis*, and was called tenant by the curtesy *initiate*, and this estate being once vested in him by the birth of the child was not liable to be determined by the subsequent death or coming of age of the infant.

Tenant in *dower* is where the husband of a woman is seised of an estate of inheritance, and dies; in this case, the wife shall have the third part of all the lands and tenements whereof he was seised during the coverture, to hold to herself for the term of her natural life.

Dower is called in Latin by the foreign jurists *doarium*, but by Bracton and our English writers *dos*, which among the Romans signified the marriage portion which the wife brought to her husband but with us is applied to signify this kind of estate to which the civil law, in its original state, had nothing that bore a resemblance, nor, indeed, is there anything in general more different than the regulation of landed property according to the English and Roman laws. Dower out of lands seems also to have been unknown in the early part of our Saxon constitution, for, in the laws of King Edmond, the wife is directed to be supported wholly out of the personal estate. Afterward, as may be seen in gavel-kind tenure, the widow became entitled to a conditional estate in one-half of the lands with a proviso that she remained chaste and unmarried, as is usual also in copyhold dowers, or free-bench. Yet some have ascribed the introduction of dower to the Normans, as a branch of their local tenures, though we cannot expect any feudal reason for its invention since it was not a part of the pure, primitive, simple law of feuds, but was first of all introduced into that system (wherein it was called *triens tertia*, and *dotalitium*) by the Emperor Frederick the Second, who was contemporary with our King Henry III. It is possible, therefore, that it might be with us the relic of a Danish custom, since, according to the historians of that country, dower was introduced into Denmark by Swein, the father of our Canute the Great, out of gratitude to the Danish ladies who sold all their jewels to ransom him when taken prisoner by the Vandals. However this be, the reason which our law gives for adopting it is a very plain and sensible one—for the sustenance of the wife, and the nurture and education of the younger children.

G[1]

Of estates that are less than fee hold there are three sorts: (1) estates for years; (2) estates at will; (3) estates by sufferance.

An estate for years is a contract for the possession of lands or tenements for some determinate period, and it takes place where a man letteth them to another for a term of a certain number of years, agreed upon between the lessor and the lessee, and the lessee enters

[1] 2 Blackstone, *op. cit.*, pp. 140–44.

thereon. If the lease be but for a half a year or a quarter, or any less time, this lessee is respected as a tenant for years, and is so styled in some legal proceedings, a year being the shortest term which the law in this case takes notice of.

These estates were originally granted to mere farmers or husbandmen, who every year rendered some equivalent in money, provisions, or other rent, to the lessors or landlords; but, in order to encourage them to manure and cultivate the ground, they had a permanent interest granted them, not determinable at the will of the lord. And yet their possession was esteemed of so little consequence that they were rather considered as the bailiffs or servants of the lord who were to receive an account for the profits at a settled price, than as having any property of their own. And therefore they were not allowed to have a freehold estate, but their interest (such as it was) vested after their deaths in their executors, who were to make up the accounts of their testators with the lord and his other creditors, and were entitled to the stock upon the farm. The lessee's estate might also, by the ancient law, be at any time defeated by a common recovery suffered by the tenant of the freehold, which annihilated all leases for years then subsisting, unless afterward renewed by the recoveror, whose title was supposed superior to his by whom those leases were granted.

We have before remarked and endeavored to assign the reason of the inferiority in which the law places an estate for years, when compared with an estate for life, or an inheritance, observing, that an estate for life, even if it be *pur autre vie*, is a freehold, but that an estate for a thousand years is only a chattel and reckoned part of the personal estate. Hence it follows that a lease for years may be made to commence *in futuro*, though a lease for life cannot. As, if I grant lands to Titius to hold from Michaelmas next for twenty years, this is good, but to hold from Michaelmas for the term of his natural life, is void. For no estate of freehold can commence *in futuro* because it cannot be created at common law without livery of seisin or corporal possession of the land, and corporal possession cannot be given of an estate now which is not to commence now but hereafter. And, because no livery of seisin is necessary to a lease for years, such lessee is said not to be *seised*, or to have true legal seisin of the lands. Nor indeed does the bare lease vest any estate in the lessee, but only gives him a right of entry on the tenement which is called his interest in the term or *interesse termini*, but when he has actually so entered and thereby accepted the grant, the estate is then and not before, vested in him, and

he is possessed not properly of the land, but of the term of years, the possession or seisin of the land remaining still in him who hath the freehold. Thus the word *term* does not merely signify the time specified in the lease but the estate also and interest that passes by that lease, and therefore the term may expire during the continuance of the time, as by surrender, forfeiture, and the like. For which reason, if I grant a lease to A for the term of three years and, after the expiration of the said term, to B for six years, and A surrenders or forfeits his lease at the end of one year, B's interest shall immediately take effect; but if the remainder had been to B from and after the expiration of the said three years, or from and after the expiration of the said time, in this case, B's interest will not commence till the time is fully elapsed, whatever may become of A's term.

H

Estates in land, whether for years, for life, or in fee, may be owned by one person individually or by several concurrently. An estate in land held or owned by one individually is known as an estate in severalty and is thus described by Blackstone:

"He that holds lands or tenements in *severalty*, or is sole tenant thereof, is he that holds them in his own right only, without any other person being joined or connected with him in point of interest during his estate therein. This is the most common and the usual way of holding an estate; and therefore we make the same observations here, that we did upon estates in possession, as contradistinguished from those in expectancy, in the preceding chapter: that there is little or nothing peculiar to be remarked concerning it, since all estates are supposed to be of this sort, unless they are expressly declared to be otherwise; and that in laying down general rules and doctrines, we usually apply them to such estates as are held in severalty."[1]

The outstanding forms of concurrent ownership are *joint tenancy* and *tenancy in common*. The former, Blackstone discusses as follows:

"An estate in joint tenancy is where lands or tenements are granted to two or more persons, to hold in fee simple, for life, for years, or at will. In consequence of such grants an estate is called an estate in joint tenancy, and sometimes an estate in *jointure*, which word as well as the other signifies a union or conjunction of interest.

"The creation of an estate in joint tenancy depends on the wording of the deed or devise, by which the tenants claim title; for this estate

[1] 2 Blackstone, *op. cit.*, p. 179.

can only arise by purchase or grant, that is, by the act of the parties, and never by the mere act of law. Now, if an estate be given to a plurality of persons, without adding any restrictive, exclusive, or explanatory words, as if an estate be granted to A and B and their heirs, this makes them immediately joint tenants in fee of the lands. For the law interprets the grant so as to make all parts of it take effect, which can only be done by creating an equal estate in them both. As therefore the grantor has thus united their names, the law gives them a thorough union in all other respects.

"The *properties* of a joint estate are derived from its unity, which is fourfold: the unity of *interest*, the unity of *title*, the unity of *time*, and the unity of *possession:* or, in other words, joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession."[1]

The most significant element or quality of a joint tenancy is survivorship.

"The doctrine of survivorship (is that doctrine) by which when two or more persons are seised of a joint estate, of inheritance, for their own lives, or *pur autre vie*, or are jointly possessed of any chattel interest, the entire tenancy upon the decease of any of them remains to the survivors, and at length to the last survivor; and he shall be entitled to the whole estate, whatever it may be, whether an inheritance or a common freehold only, or even a less estate. This is the natural and regular consequence of the union and entirety of their interest. The interest of two joint tenants is not only equal or similar, but also is one and the same. One has not originally a distinct moiety from the other; but, if by any subsequent act (as by alienation or forfeiture of either) the interest becomes separate and distinct, the joint tenancy instantly ceases. But while it continues, each of two joint tenants has a concurrent interest in the whole; and, therefore, on the death of his companion, the sole interest in the whole remains to the survivor."[2]

A *tenancy in common* is another form of concurrent ownership in land and is to be contrasted with a joint tenancy already described.

"Tenants in *common* are such as hold by several and distinct titles, but by unity of possession; because none knoweth his own severalty,

[1] 2 Blackstone, *op. cit.*, p. 180.

[2] *Ibid.*, pp. 183-84.

and therefore they all occupy promiscuously. This tenancy therefore happens where there is unity of possession merely, but perhaps an entire disunion of interest, of title, and of time. For, if there be two tenants in common of lands, one may hold his part in fee simple, the other in tail, or for life, so that there is no necessary unity of interest; one may hold by descent, the other by purchase, or the one by purchase from A, the other by purchase from B, so that there is no unity of title; one's estate may have been vested fifty years, the other's but yesterday, so there is no unity of time. The only unity there is, is that of possession, and for this Littleton gives the true reason, because no man can certainly tell which part is his own, otherwise even this would soon be destroyed."[1]

Survivorship is not an incident of a tenancy in common. Herein is the most significant difference between a joint tenancy and a tenancy in common—in the former, upon the death of a tenant his interest survives to his cotenant; in the latter, upon the death of the tenant his interest descends to his heir and the heir takes the place of his ancestor as a tenant in common with the surviving tenant.

In feudal times joint tenancies were regarded with favor because they tended to produce unity of ownership of estates which simplified the enforcement of feudal dues. With the passing of feudal tenures, however, courts were less inclined to favor such estates and in the course of time actually became hostile to them because of the injustice which was thought to arise from the operation of the doctrine of survivorship. Accordingly the courts began in all doubtful cases to construe a grant or conveyance as creating a tenancy in common rather than a joint tenancy. But in the absence of statutes abolishing joint tenancies a grant or conveyance to two or more persons will create a joint tenancy unless there is something in the instrument to show an intention on the part of the grantor to create separate interests or a tenancy in common.

In many states statutes have been passed modifying the common-law rules relating to joint tenancies. In some states it is provided by statute that a grant or conveyance to two or more persons shall operate to create a tenancy in common unless an intention to create a joint tenancy is clearly expressed; in other states the doctrine of survivorship as an incident of a joint tenancy has been removed, and in still other states joint tenancies have been entirely abolished.

[1] *Ibid.*, pp. 191–92.

QUESTIONS

1. What is meant by an *estate* in land? Into how many different estates may land be divided?
2. It is sometimes said that a fee-simple estate in land connotes absolute ownership. Is this true? Can there be such a thing as absolute ownership in land?
3. Trace the origin and development of a fee-simple estate.
4. What words at common law were necessary in the creation of a fee-simple estate? Why? Are such words necessary at the present time for the creation of such an estate?
5. (*a*) X conveys to G and her children, and warrants the land to her and her children forever. (*b*) X conveys to G for life, remainder to his heirs forever. (*c*) X conveys to G for life, remainder to his children forever. What is the effect of the conveyance in each case?
6. State the rule in *Shelley's Case*. How does the rule operate? What is the significance of the rule?
7. What is the nature of a mortgage? What is its purpose? What estate does it confer upon the mortgagee? What estate is left with the mortgagor?
8. Who is entitled to the mortgaged premises before default in the payment of the mortgage debt by the mortgagor? Who is entitled to possession after default by the mortgagor?
9. D executes a mortgage to C to secure a debt of $5,000, due January 1, 1922. (*a*) On January 1, 1922, D pays the debt. What is the effect of the payment? (*b*) D does not pay the debt until January 15. What is the effect of the payment at this time? (*c*) On January 2, C goes into possession of the land. What are C's rights with respect to the property? (*d*) After D defaults in the payment of the mortgage debt what are his rights with respect to the mortgaged property?
10. In the foregoing case, C assigns his claim against D to B but does not make an assignment of the mortgage. What are B's rights with respect to the property?
11. What is meant by an *equity of redemption?* How do you account for the fact that courts of equity gave this right to the mortgagor?
12. Does the theory of the mortgage as discussed by Blackstone still obtain in our law at the present time?
13. What is meant by a *life estate?* Is it a freehold or non-freehold estate? Is it inheritable?
14. In what different ways does life estate come into existence?
15. What is a life estate by *curtesy?* Does tenancy by curtesy still exist in our law?
16. What is a life estate through *dower?* Does tenancy by dower still exist in our law?

17. What are the rights of the life tenant with respect to land from which his life estate rises?
18. Examine the statutes of some state in which you are interested and make a brief digest of the statutory provisions relating to curtesy and dower.
19. What is meant by an *estate for years?* Is it a freehold estate? Is it an inheritable estate?
20. How is a leasehold estate created? Must the lease be in writing? Is entry by the lessee necessary to the validity of a lease?
21. H holds a lease on Blackacre for ninety-nine years. Is his interest real or personal? To whom does his interest pass on his death?
22. In the foregoing case, D, the lessor, unjustifiably evicts H from Blackacre. H sues D in ejectment for possession of the land. D contends that H cannot maintain the action of ejectment. What decision?
23. X, owner of Blackacre, leases it to P for ten years. A year later, he sells Blackacre to D. What is the effect of the sale on P's leasehold interest?
24. "A life estate is a more dignified estate than a leasehold estate." How do you account for this?
25. How do you account for the fact that a leasehold estate is regarded merely as personal property?
26. It has been said that a life estate is a device primarily useful in family affairs and that a leasehold estate is a device primarily useful in commercial affairs. To what extent is this true?
27. What is an estate in *severalty?* What is the difference between a *joint tenancy* and a *tenancy in common?*
28. How is a tenancy in common created? How is it terminated? How is a joint tenancy created? How is it terminated?

ii. ENJOYMENT OF ESTATES

A

One of the powers which an owner of land has over his property is to carve out of it different estates and distribute them among various persons. If A grants from his fee simple a life estate to B, there remains in A and heirs a reversion. This reversion, in other words, is the residue of an estate left in the grantor and his heirs to come again into his or his heirs' possession upon the termination of the particular estate which he granted to B. But if A does not want the residue of the estate to come back to him, at the same time that he creates the particular estate in B he may dispose of the residue by giving it to C. When the residue is given to C, it is then designated as a remainder and not a reversion. Remainders and reversions, it will be noted,

differ in this: that a remainder must be expressly created, whereas a reversion results by operation of law where the grantor has created particular estates, less *in quantum* than his whole estate, and has not disposed of the residue.

Great importance was attached in early times to the continuity of the seisin or freehold possession. The feudal dues could be enforced only against him who held the seisin. Accordingly, the overlords insisted that there always be someone seised of the estate, to whom they might look for the performance of the duties arising out of the feudal relation. Because of this pressure from the lords, the courts early held that remainders could not be created which would result in putting the seisin in abeyance. In other words, in the creation of remainders, the grantor must be careful that he leave no gaps in the seisin between remainders. From this general policy of the law, two specific rules arose. In the first place, a remainder had to begin, or pass out of the grantor, at the very moment of the creation of the particular estate. In the second place, the remainder had to vest in the remainderman during the continuance of the particular estate, or at the very instant that the particular estate terminated.

Another technical rule relating to the creation of remainders must be noted. It was not permissible for the grantor to create one remainder and then to create another cutting short the first. For instance, A would not be permitted to grant Blackacre to B for life, remainder to C and his heirs, but if C shall marry X, to D and his heirs. There was no very good reason for holding that the conveyance as to D was void, but the judges said, in early times, that having given an absolute estate to C, the one in favor of D in derogation of the first was repugnant and, therefore, void.

Subject to the foregoing rules that there must be no gaps or laps in the seisin the grantor could create as many remainders in succession as he might wish to do. As for instance, X grants to A for life, remainder to B for life, remainder to C for life, remainder to D and the heirs of his body, remainder to E and his heirs. The fact that one or more of the remaindermen might never enjoy the possession of the estate did not affect the possibility or legality of their creation.

Remainders are of two kinds, vested and contingent. A vested remainder is one where the only condition precedent to the remainderman's taking possession of the estate is the termination of the particular estate preceding it. So if X grants to A for life, remainder to B

for life, remainder to C and his heirs, if B is now *in esse*, he has a life estate vested in interest, because the only condition precedent to his actual possession and enjoyment of the estate is the termination of A's life estate. His estate is none the less vested because he may never actually enjoy possession, as if he were to die before the termination of A's estate.

If a remainder to a given person is subject to conditions precedent other than the termination of the preceding particular estate, the remainder is contingent. X grants to A for life, remainder to B for life, if he return from Rome, remainder to C and his heirs. So long as B remains in Rome, the remainder to him is contingent, because it is uncertain whether he will ever return. The moment that he returns, all conditions precedent to his taking possession, other than the termination of the estate of A, have been performed, and his remainder then becomes vested in interest. X grants Blackacre to A for life, remainder to B's eldest son, remainder to C and his heirs. If B has no son now, the remainder to his eldest son is contingent, because it is uncertain that he will ever have a son. But the moment a son is born to B, the uncertainty is removed, and the remainder to eldest son becomes vested in interest although possession by him is postponed until A's estate is terminated.

At common law contingent remainders had a precarious existence. In the first place, if a particular estate terminated and the next remainder was still contingent, that remainder failed and the estate passed on until it came to a remainderman who was then ready to go into possession. If none of the succeeding remainders were vested, the estate would revert by operation of law to the original grantor. So in the case last supposed in the foregoing paragraph, if A had died before a son was born to B, the remainder to B's eldest son would have failed, and the estate would have passed on to C, if his remainder had been vested, otherwise it would have gone back to X. The reason for the failure of contingent remainders in this manner was a feudal one—that the seisin or freehold must never be in abeyance, not even for a moment. There always had to be someone holding the freehold possession to whom the lord might look for the performance of the feudal burdens.

In the second place, the tenant of a particular estate might defeat a contingent remainder by several more or less wrongful acts of his own. He might by a tortious conveyance of his particular estate,

destroy it with the consequent destruction of any contingent remainder dependent upon it. He might do some act which would cause a forfeiture of his estate, which would entitle the next vested remainderman to come in and claim the estate, thus destroying the intervening contingent remainder. He might defeat the contingent remainder by surrendering his estate to the next vested remainderman, having an estate *in quantum* at least as large as the one surrendered, or by buying up the next vested remainder; in either event, the particular estate and the next vested estate would merge, and the contingent remainder dependent upon the particular estate would be squeezed out.

In all common law jurisdictions the precariousness of contingent remainders has been lessened in one way or another, but principally by legislation. In England and in most states in this country it is provided, in substance, that a contingent remainder shall not fail because of a determination by forfeiture, surrender, or merger of any preceding estate of freehold. In a few states in this country it is provided that "no contingent remainder shall fail by reason of the termination of the particular estate before the happening of the contingency."

Vested remainders are readily transferable by will or by a conveyance *inter vivos*. At common law, being incorporeal in nature, a vested remainder was transferable by an act *inter vivos* only by a deed of grant. It could not be transferred by livery of seisin, because the remainderman, not being in possession, could not deliver possession, an indispensable requirement of a transfer by livery of seisin.

Contingent remainders, on the other hand, were regarded as such shadowy and uncertain estates by the common law that they were not dignified to the extent of being given the element of transferability by a conveyance *inter vivos*. Strange to say, however, they were held to be a sufficient estate in land to be transferable by will. By statutory provisions in England, and in some states in this country, contingent remainders may be transferred by a conveyance *inter vivos*.

B[1]

An executory devise of lands is such a disposition of them by will that thereby no estate vests at the death of the devisor but only on some future contingency. It differs from a remainder in three very material points: (1) that it needs not any particular estate to support it; (2) that by it a fee simple or other less estate may be limited after

[1] Blackstone, *op. cit.*, pp. 172–73.

a fee simple; (3) that by this means a remainder may be limited of a chattel interest after a particular estate for life created in the same.

The first case happens when a man devises a future estate to arise upon a contingency; and till that contingency happens, does not dispose of the fee simple but leaves it to descend to his heir at law. As if one devises land to a femme sole and her heirs, upon her day of marriage; here is in effect a contingent remainder without any particular estate to support it, a freehold commencing *in futuro*. This limitation, though it would be void in deed, yet is good in a will, by way of executory devise. For, since by a devise a freehold may pass without corporal tradition or livery of seisin (as it must do, if it passes at all), therefore it may commence *in futuro*, because the principal reason why it cannot commence *in futuro* in other cases is the necessity of actual seisin, which always operates *in praesenti*. And, since it may thus commence *in futuro* there is no need of a particular estate to support it, the only use of which is to make the remainder, by its unity with the particular estate, a present interest. And hence also, it follows that such an executory devise, not being a present interest, cannot be barred by a recovery suffered before it commences.

By executory devise a fee or other less estate may be limited after a fee. And this happens where a devisor devises his whole estate in fee, but limits a remainder thereon to commence on a future contingency. As if a man devises land to A and his heirs, but if he dies before the age of twenty-one, then to B and his heirs—this remainder, though void in deed, is good by way of executory device.

C[1]

The various necessities of mankind induced also the judges very soon to depart from the rigor and simplicity of the rules of the common law and to allow a more minute and complex construction upon conveyancees to uses than upon others. Hence it was adjudged that the use need not always be executed the instant the conveyance is made, but, if it cannot take effect at that time, the operation of the statute may wait till the use shall arise upon some future contingency, to happen within a reasonable period of time, and in the meanwhile the ancient use shall remain in the original grantor, as when lands are conveyed to the use of A and B after a marriage shall be had between them, or to the use of A and his heirs till B shall pay him a sum of money, then to the use of

[1] *Ibid.*, pp. 334–35.

B and his heirs. Which doctrine, when devises by will were again introduced and considered as equivalent in point of construction to declarations of uses, was also adopted in favor of *executory devises*. But herein these, which are called *contingent* or *springing* uses, differ from an executory devise in that there must be a person seised to such uses at the time when the contingency happens, else they can never be executed by the statute, and therefore if the estate of the feoffee to such uses be destroyed by alienation or otherwise before the contingency arises, the use is destroyed forever, whereas by an executory devise the freehold itself is transferred to the future devisee. And in both these cases a fee may be limited to take effect after a fee, because, though that was forbidden by the common law in favor of lord's escheat, yet when the legal estate was not extended beyond one fee simple, such subsequent uses (after a use in fee) were before the statute permitted to be limited in equity, and then the statute executed the legal estate in the same manner as the use before subsisted. It was also held that a use, though executed, may change from one to another by circumstances *ex post facto*, as, if A makes a feoffment to the use of his intended wife and their eldest son for their lives, upon the marriage the wife takes the whole use in severalty, and, upon the birth of a son, the use is executed jointly in them both. This is sometimes called a *secondary*, sometimes a *shifting*, use. And, whenever the use limited by the deed expires or cannot vest, it returns back to him who raised it, after such expiration or during such impossibility, and is called a *resulting* use. As, if a man makes a feoffment to the use of his intended wife for life, with remainder to the use of her first-born son in tail, here, till he marries, the use results back to himself; after marriage, it is executed in the wife for life, and, if she dies without issue, the whole results back to him in fee.

QUESTIONS

1. How does a reversion differ from a remainder? Are they corporeal or incorporeal in nature? Were they transferable at early common law? If so, in what manner?
2. What reasons led to the creation of reversions and remainders? Particularly, why did grantors wish to create contingent remainders?
3. What is the difference between a vested and a contingent remainder?
4. In what different ways could a contingent remainder be destroyed? What is the significance of the fact that contingent remainders could be destroyed?

5. What is meant by seisin? Why were the early common-law courts so solicitous about the continuity of seisin?
6. X enfeofs A and his heirs to begin ten days after X's death. Was this conveyance good?
7. X enfeofs A and his heirs for life, remainder to B in fee if she marries Y, otherwise to C in fee. What is the nature of these remainders? Were they valid?
8. X enfeofs A for life, remainder to A's unborn issue for life, remainder to the unborn issue of A's unborn issue in fee. Were these remainders good?
9. What is meant by an executory devise? How was it created? How does it differ from a common-law remainder? Was the interest of the executory devisee destructible?
10. What is a shifting use? A springing use? A contingent use? Did the Statute of Uses execute shifting and future uses?
11. Were shifting and future uses destructible? Why or why not?
12. What is the significance of the fact that certain of these future estates in land were held to be indestructible?

iii. LIMITATIONS ON CREATION OF FUTURE ESTATES

A[1]

But, in both these species of executory devises, the contingencies ought to be such as may happen within a reasonable time, as within one or more life or lives in being or within a moderate term of years, for courts of justice will not indulge even wills, so as to create a perpetuity, which the law abhors, because, by perpetuities, estates are made incapable of answering those ends of social commerce and providing for the sudden contingencies of private life for which property was at first established. The utmost length that has hitherto been allowed for the contingency of an executory devise of either kind to happen in is that of a life or lives in being and one and twenty years afterward. As when lands are devised to such an unborn son of a femme covert, as shall first attain the age of twenty-one, and his heirs, the utmost length of time that can happen before the estate can vest is the life of the mother and the subsequent infancy of the son, and this hath been decreed to be a good executory devise.

B

In all times men have sought to reach a hand through time and control the future use and ownership of the property which they leave

[1] 2 Blackstone, *op. cit.*, pp. 173–74.

behind them. Though this tendency is well-nigh universal, the common law has always looked upon such attempts with a greater or less degree of suspicion and disapproval. "The law," it is said, "abhors a perpetuity." The feudal lords in England sought to maintain a future control over property by the creation of the estates tail, but the courts, by fictions of one kind and another, soon permitted the tenant in tail to destroy the estate given to him. The creation of contingent remainders was an attempt to secure future control over the ownership in land. Contingent remainders likewise failed to meet the expectations of those who resorted to them, the remainder failed in case the preceding estate terminated naturally before the contingent remainderman was ready to come in; the holder of a particular estate might destroy his own estate with the consequent destruction of any contingent remainder dependent upon it; moreover, the common law early came to the conclusion that a remainder to the unborn issue of unborn issue was void for remoteness.

In the course of time, however, it became possible by will to create an estate to begin at some future and remote time upon the happening or non-happening of some designated contingency. These estates came to be known as *executory devises*. X might, for instance, devise Blackacre to A in fee, but if A or his heirs leave the Church of England, to B in fee. In 1620, in the case of *Pells* v. *Brown*, Cro. Jac. 590, it was held that a future estate by way of an executory devise was not destructible by any act of the tenant. Furthermore, the owner of property, by means of shifting, springing, and future uses, could create estates in land to begin in the future. And these interests were neither destructible nor subject to failure as contingent remainders were at common law.

If an owner of land could have tied it up indefinitely by means of executory devices and future uses, it is easy to see that it would not have been long before most land would have been hopelessly entangled in the meshes of these devices and thus made less and less available for the purpose of trade and commerce. After the recognition of these devices and their indestructibility, the question naturally arose, How far in the future may a person control the ownership of property? The answer to this question came in the origin and development of the Rule against Perpetuities.

In 1682, in the *Duke of Norfolk's Case*, 3 Chancery Cases, 1, Lord Chancellor Nottingham held that a future interest by way of an executory devise was not invalid provided it must vest in interest, if

at all, within the continuance of a life or lives in being at the time the interest was created. But Lord Nottingham would not say whether the vesting in interest of a future estate might be posponed for a longer period than this. In discussing this question, he said: "But what time? and where are the bounds of the contingency? You may limit it, it seems, upon a contingency to happen in a life; what if it be limited, if such a one die without issue within twenty-one years, or one hundred years, or while Westminster Hall stands? when will you stop, if you do not stop here? I will tell you where I will stop; I will stop whenever any visible inconvenience doth appear, for the just bounds of a fee simple upon a fee simple are not yet determined, but the first inconvenience that ariseth upon it will regulate it."

In 1736, about sixty years later, the case of *Stephens* v. *Stephens*, reported in Cas. Temp. Talb. 228, arose in which the executory devise was "to such other son of the body of my daughter, May Stephens, by my son-in-law Thomas Stephens, as shall happen to attain the age of twenty-one years, his heirs and assigns." At the death of the testator, when the will became operative, May and Thomas Stephens were persons in being, but "such other son" was not yet *in esse*. The court was of the opinion that the limitation to "such other son," under these circumstances, was not an objectionable perpetuity. Since the estate could not vest in "such other son" until he was twenty-one years of age, which might have been twenty-one years after all lives in being at the time of the testator's death had passed out, the court, in order to uphold the validity of the gift, was compelled to extend the rule laid down in the *Duke of Norfolk's Case* by a term of twenty-one years to cover the period of infancy. This the court did upon the theory that the "power of alienation will not be restrained longer than the law will restrain it, viz., during the infancy of the first taker."

After the extension made in the case of *Stephens* v. *Stephens*, it was not long before the cases had established the rule that nine or ten months more, equivalent to the ordinary period of gestation, might be allowed in addition to the twenty-one years, where infancy was involved. X gives property to trustees to pay the income to H for life, and the property absolutely to such son of H as shall happen to reach the age of twenty-one years. H may marry W, a person who was not in being at the death of X. W may conceive a child in January. H, the father of the child and all others designated by X as lives in being, may die in February. The son of H and W may claim the estate

after all lives in being have passed away, and after the expiration of twenty-one years and nine or ten months. But the gift to such son would be upheld, for the courts thought it just and not unreasonable to add a period, equivalent to the ordinary period of gestation, to the twenty-one-year period where infancy was involved.

In 1833, almost one hundred years after the decision in *Stephens* v. *Stephens*, the case of *Caddell* v. *Palmer*, 1 Cl. and F. 372, arose in which the following questions were presented to the English House of Lords for consideration: (*a*) whether a limitation, by way of executory devise, is good if it must vest within a life or lives in being, and, in addition, twenty-one years as a term in gross without reference to the infancy of any person; (*b*) whether, in addition to the foregoing, nine months might be added, equivalent to the ordinary period of gestation, without reference to the infancy of any person. The court answered the first question in the affirmative and the second in the negative.

The rule against perpetuities in its final form may be stated thus: A future estate must vest in interest, if at all, within lives which were in being at the time the gift or grant became operative and twenty-one years thereafter; when infancy is involved, to the foregoing period may be added nine or ten months to cover the period of gestation.

The rule applies to all future interests in property, whether the property be real or personal. It applies to interests whether created by way of executory devises or by future uses. Reversions and remainders are not affected by the rule, for by definition they are vested interests. Legal contingent remainders are not within the operation of the rule. A contingent remainder limited after a life in being cannot possibly be too remote because the estate must vest in interest, if at all, at the termination of a life which was in being at the time the remainder was created, which satisfies the rule. A remainder limited to the unborn issue of unborn issue would be too remote because such a remainder might vest in interests more than twenty-one years after all lives in being had passed out. But future interests of this kind are void, quite independently of the rule against perpetuities, under an old common-law rule that a possibility on a possibility is void. Moreover, a contingent remainder at common law does not offend the policy of the rule, for, while contingent, it is subject to failure and may be destroyed in several ways by the holder of the particular estate upon which the contingent remainder is dependent. An equitable contingent remainder, being neither destructible nor subject to failure by natural causes, is within the operation

of the rule. It has been pointed out in another connection that some states by statute provide that a contingent remainder shall not fail by reason of the premature termination of the preceding particular estate, and in most states it is provided by statute that no act of the tenant of the particular estate shall have the effect of destroying a contingent remainder. Such legislation places legal contingent remainders substantially on the same basis as equitable contingent remainders, which brings them within the operation of the rule against perpetuities.

It should be noted carefully that the rule against perpetuities is not aimed at taking possession of property at remote times, but is aimed at the vesting of interests in property at remote times. If a future estate must vest in interest within lives in being and twenty-one years thereafter, if it vests at all, it is not material that the tenant is not entitled to possession until some time beyond this period. Therefore, in determining whether a given limitation violates the rule, the test is not when the tenant may take possession, but when does he have an estate vested in interest, subject to no conditions precedent other than the termination of the preceding estate.

The validity of a future limitation must be tested as of the moment when the grant or gift becomes operative. A grant by deed becomes operative when the deed is delivered. A gift by will becomes operative when the maker of the will dies. A gift by will, if considered as of the time when the will was made, may be void for remoteness, but if considered as of the time when the will speaks, at the death of the maker of the will, the gift may be valid. X devises property to trustees, to pay the income to E for life, and after the death of E to divide the property among the children of E, who happen to reach the age of twenty-five years. At the time the will is made E is living. If the will is considered as of this time, the gift to E's children will be void because children, born to E after the death of X, may claim an interest in the property more than twenty-one years after all lives in being have passed out. But in the case as it arose, it appeared that E died before X, and the future limitation in favor of E's children was held good because all beneficiaries were lives in being at the death of X, and it would not have been possible for an interest to vest under the will beyond lives in being and twenty-one years. (*Southern* v. *Wollaston*, 16 Beavan, 276.)

The testator or grantor, in drawing up the document creating future estates, may designate as a standard for measuring the time

within which he wishes to postpone the vesting of the estates any number of lives in being, provided, as it is intimated in the cases, these lives are readily ascertainable. Any number of lives may, therefore, be designated, and it is not necessary that the lives chosen should be lives of beneficiaries under the gift or grant. It is said that Herbert Spencer limited his estate by the descendants of Queen Victoria, living at Spencer's death.

The fact that there is very strong probability that an estate will vest in interest within the required time is not sufficient to satisfy the rule. If there is any possibility, however remote, that a future interest may take effect beyond lives in being and twenty-one years, the interest is void for remoteness. In the case of *Jee* v. *Audley*, 1 Cox, 324, 1787, Edward Audley by his will bequeathed as follows: "One thousand pounds shall be at interest, which interest I give during her life to my wife, and at her death, I give the said sum to my niece, Mary Hall, and the issue of her body, and in default of such issue, I give the said one thousand pounds to be equally divided between the daughters *then living* of my kinsman John and his wife Elizabeth." Edward's wife died before he did. At the death of Edward, John and Elizabeth, of very advanced years, were still living and had four daughters; Mary Hall was forty years of age and unmarried. The four daughters of John and Elizabeth brought a bill to have the thousand pounds secured for their benefit in case Mary Hall should die without issue. But the court was of the opinion that the limitation in favor of the daughters might vest at a too remote period and held the will bad so far as the gift over was concerned. It is pretty obvious under the facts of the case that it was highly improbable that any estate would vest at any time forbidden by the rule against perpetuities. But there was a remote possibility that such a contingency might come about and this remote possibility made the gift to the daughters of John and Elizabeth invalid.

To show the remote possibility mentioned above, suppose that Edward had died in 1800. In 1810, John and Elizabeth might conceivably have had a fifth daughter, although such an event was highly improbable. In 1815, Mary Hall might have married and have had issue of a daughter. By 1820, all persons mentioned in the will, who who were in being at the death of Edward, might have died leaving only the fifth daughter of John and Elizabeth and the daughter of Mary Hall.

In 1850, the daughter of Mary Hall might have died without leaving any issue. At that moment, the contingency mentioned in Edward's will would have happened, when the daughters of John and Elizabeth, *then living*, should receive the one thousand pounds. But the fifth daughter of John and Elizabeth was not a life in being at the death of Edward, and to have allowed the estate to vest in her in 1850 would have been permitting an interest to vest more than twenty-one years after the last life, in being at the time of Edward's death, had passed away. This was a very remote possibility, yet it was a possibility, and as such rendered the gift over in favor of the daughters of John and Elizabeth, *then living*, void for remoteness.

QUESTIONS

1. State the Rule against Perpetuities. Trace the origin and development of this rule.
2. It is said that the purpose of the rule against perpetuities is to preserve the fluidity of property. What is meant by this? To what extent does it accomplish this purpose?
3. Is the rule against perpetuities aimed against restraints on alienation or against remote vesting of interests in property?
4. What is the difference between vesting in possession and vesting in interest? Which, when postponed for an unreasonable length of time, offends the rule against perpetuities?
5. State the rule as to the number and character of lives which may be designated as a measure of the time for which the vesting of an interest may be postponed.
6. It is practically certain that a given limitation will vest within the time required by the rule, but it is remotely possible that the interest will not. Is the limitation good or bad?
7. Were legal contingent remainders subject to the rule at common law? Why or why not? Are they subject to the rule now? Why or why not?
8. What is the difference between a legal contingent remainder and an equitable contingent remainder? Is the latter subject to the operation of the rule?
9. X grants to A for life, remainder in fee to such of A's children as may reach the age of twenty-one years. Is the interest in favor of A's children subject to the rule?
10. X by will leaves property to A in fee, if A die without issue in his own life, (*a*) to B's children who reach the age of twenty-one years; (*b*) to B's children who reach the age of twenty-five years during the life of

B; (*c*) to B's children who reach the age of twenty-five years. B is a person in being at the time of X's death. Pass on the validity of the limitation under each hypothesis.

11. The X Corporation sells land and stipulates that it may repurchase the land at any time in the future when it needs it. It is contended that this stipulation violates the rule against perpetuities and is void. What decision?

12. X gives Blackacre to the B University and provides that the land shall revert to his heirs in the event that the university ever ceases to be under the control of the B Church. The university contends that this provision violates the rule against perpetuities and is void. What decision?

13. In many states statutes have been passed changing the rule against perpetuities. Examine the statutes of some state in which you are interested and make a brief digest of any changes which may have been made with respect to this rule.

c) *Transferability of Estates in Land*

i. IN GENERAL

A

Private ownership in property, as has been pointed out in another connection, performs certain important functions in our economic society. It is an organizing force in that it stimulates and increases economic activities. It is to a very large extent the basis of trade and commerce in that it is the subject-matter in which the business community chiefly deals. In order to perform well these functions, it should, and at present does, possess, among other qualities, the quality of transferability.[1] Take away from private property this quality of transferability, and ownership in a very large measure ceases to be an incentive in motivating production, acquisition, and improvement of property. Take away this quality, and property, the subject-matter of ownership, ceases entirely to function as a convenient basis for business dealings.

Real property, or ownership in land, has not always connoted, as it does at the present time, a relatively high degree of transferability. Property, as we now understand it in the common law, with all that it implies, is a resultant of many forces—military, religious, social, and economic—working through centuries of English constitutional

[1] In this connection *transferability* is used to connote a change in ownership whether brought about by act of parties or by operation of law.

history. Real property, beginning in the English law at the time of the Norman invasion as a military institution and gradually passing into a family institution, has in these times become essentially an institution of trade and commerce. Transferability as an element of ownership in land has emerged by slow degrees through these centuries and its content today can be understood only in terms of its development.

B

2 Blackstone, *Commentaries on the Laws of England*, pp. 55–58, reprinted *supra*, p. 531.

C

2 Blackstone, *Commentaries on the Laws of England*, pp. 110–12, 116–19, reprinted *supra*, p. 534.

D

Hayes, *Conveyancing*, 5th ed., pp. 48–49, reprinted *supra*, p. 542.

E

Hayes, *Conveyancing*, 5th ed., pp. 49–54, reprinted *supra*, p. 543.

F[1]

The methods, therefore, of acquiring on the one hand and losing on the other a title to estates in things real are reduced by our law to two: descent, where title is vested in a man by the single operation of law, and purchase, where the title is vested in him by his own act of agreement.

Descent or hereditary succession is the title whereby a man on the death of his ancestor acquires his estate by right of representation, as his heir at law. An heir, therefore, is he upon whom the law casts the estate immediately on the death of the ancestor; and an estate so descending to the heir is in law called the inheritance.

QUESTIONS

1. What does ownership in land include? Does it necessarily include the quality of transferability?
2. What functions, if any, does the institution of private property perform in our economic society? Could it perform well these functions without the quality of transferability?
3. How do you account for the fact that the transfer of estates in land has always been more cumbersome and complex than the transfer of ownership in personal property?
4. Briefly trace the development of the quality of transferability of estates in land.

[1] 2 Blackstone, *Commentaries on the Laws of England*, p. 201.

5. What is the significance of the Statute *De Donis* in connection with transferability of land? How do you account for the fact that the courts permitted this statute to be evaded by the *fine* and the *common recovery*?
6. What, briefly, are the provisions of the Statute of *Quia Emptores*? What is the significance of this statute in connection with the transferability of real property?
7. How did the *use* contribute to the transferability of estates in land? How was transferability affected by the passage of the Statute of Uses?
8. What is meant by the *Mortmain Code*? How did the mortmain policy affect the transferability of land?
9. In what different ways at the present time can ownership in land be transferred? What is the difference between taking land by descent and by purchase?

ii. TITLE BY DEVISE AND TITLE BY DESCENT

A[1]

The nature and degrees of kindred being thus in some measure explained, I shall next proceed to lay down a series of rules, or canons of inheritance, according to which estates are transmitted from the ancestor to the heir; together with an explanatory comment, remarking their origin and progress, the reasons upon which they are founded, and in some cases their agreement with the laws of other nations.

The first rule is: that inheritance shall lineally descend to the issue of the person last actually seised, *in infinitum*, but shall never lineally ascend.

A second general rule or canon is: that the male issue shall be admitted before the female.

A third rule, or canon of descent, is this: that where there are two or more males in equal degree, the eldest only shall inherit; but the female all together. As if a man hath two sons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and dies, Matthew, his eldest son, shall alone succeed to his estate, in exclusion of Gilbert, the second son, and both the daughters; but, if both the sons die without issue before the father, the daughters Margaret and Charlotte shall both inherit the estate as coparceners.

A fourth rule, or canon of descent, is this: that the lineal descendants, *in infinitum*, of any person deceased shall represent their ancestor, that is, shall stand in the same place as the person himself would have done, had he been living. Thus the child, grandchild, or great-

[1] 2 Blackstone, *op. cit.*, pp. 208–35.

grandchild (either male or female) of the eldest son succeeds before the younger son, and so *in infinitum*. And these representatives shall take neither more nor less, but just so much as their principals would have done. As if there be two sisters, Margaret and Charlotte; and Margaret dies, leaving six daughters; and then John Stiles, the father of the two sisters, dies, without other issue, these six daughters shall take among them exactly the same as their mother Margaret would have done, had she been living; that is, a moiety of the lands of John Stiles in coparcenary: so that, upon partition made, if the land be divided into twelve parts, thereof Charlotte, the surviving sister, shall have six, and her six nieces, the daughters of Margaret, one apiece.

A fifth rule is: that on failure of lineal descendants or issue of the person last seised, the inheritance shall descend to the blood of the first purchaser, subject to the three preceding rules. Thus if Geoffrey Stiles purchases land, and it descends to John Stiles, his son, and John dies, seised thereof without issue; whoever succeeds to this inheritance must be of the blood of Geoffrey, the first purchaser of this family. The first purchaser, *perquisitor*, is he who first acquired the estate to his family, whether the same was transferred to him by sale or by gift or by any other method, except only that of descent.

A sixth rule or canon therefore is: that the collateral heir of the person last seised must be his next collateral kinsman, of the whole blood.

The seventh and last rule or canon is: that in collateral inheritance the male stock shall be preferred to the female (that is, kindred derived from the blood of the male ancestors shall be admitted before those from the blood of the female) unless where the lands have, in fact, descended from a female.

B[1]

It seems sufficiently clear that before the Conquest lands were devisable by will. But, upon the introduction of the military tenures, the restraint of devising lands naturally took place as a branch of the feudal doctrine of non-alienation without the consent of the lord. And some have questioned whether this restraint (which we may trace even from the ancient Germans) was not founded upon a truer principle of policy than the power of wantonly disinheriting the heir by will and transferring the estate, through the dotage or caprice of the ancestor, from those of his blood to utter strangers. For this, it is alleged, maintained the balance of property and prevented one man

[1] *Ibid.*, pp. 373–76.

from growing too big or powerful for his neighbors, since it rarely happens that the same man is heir to many others, though by art and management he may frequently become their devisee. Thus the ancient law of the Athenians directed that the estate of the deceased should always descend to his children; or on failure of lineal descendants should go to the collateral relations, which had an admirable effect in keeping up equality and preventing the accumulation of estates. But when Solon made a slight alteration, by permitting them (though only on failure of issue) to dispose of their lands by testament and devise away estates from the collateral heir, this soon produced an excess of wealth in some and poverty in others, which by a natural progression first produced popular tumults and dissensions and these at length ended in tyranny and the utter extinction of liberty, which was quickly followed by a total subversion of their state and nation. On the other hand, it would now seem hard, on account of some abuses (which are the natural consequences of free agency when coupled with human infirmity) to debar the owner of lands from distributing them after his death, as the exigencies of his family affairs or the justice due to his creditors may require. And this power, if prudently managed, has with us a peculiar propriety by preventing the very evil which resulted from Solon's institution—the too great accumulation of property by primogeniture, to which the Athenians were strangers. Of this accumulation the ill effects were severely felt even in the feudal times, but it should always be strongly discouraged in a commercial country whose welfare depends on the number of moderate fortunes engaged in the extension of trade.

However this be, we find that by the common law of England since the Conquest no estate greater than for a term of years could be disposed of by testament except only in Kent and in some ancient burghs and a few particular manors where their Saxon immunities by special indulgence subsisted. And though the feudal restraint on alienations by deed vanished very early, yet this on wills continued for some centuries after, from an apprehension of infirmity and imposition on the testator *in extremis* which made such devises suspicious. Besides, in devises there was wanting that general notoriety and public designation of the successor, which in descents is apparent to the neighborhood and which the simplicity of the common law always required in every transfer and new acquisition of property.

But when ecclesiastical ingenuity had invented the doctrine of uses, as a thing distinct from the land, uses began to be devised very

frequently and the devisee of the use could in chancery compel its execution. For it is observed by Gilbert that, as the popish clergy then generally sat in the court of chancery, they considered that men are most liberal when they can enjoy their possessions no longer, and therefore at their death would choose to dispose of them to those who, according to the superstition of the times, could intercede for their happiness in another world. But when the Statute of Uses had annexed the possession to the use, these uses being now the very land itself became no longer devisable which might have occasioned a great revolution in the law of devises, had not the statute of wills been made about five years after, viz., 32 Hen. VIII, c. 1. (1540) explained by 34 Hen. VIII, c. 5. which enacted that all persons being seised in fee simple (except femme coverts, infants, idiots, and persons of non-sane memory) might by will and testament in writing devise to any other person, but to bodies corporate, two-thirds of their lands, tenements, and hereditaments, held in chivalry, and the whole of those held in socage, which now, through the alteration of tenures by the statute of Charles the Second, amounts to the whole of their landed property, except their copyhold tenements.

With regard to devises in general, experience soon showed how difficult and hazardous a thing it is, even in matters of public utility, to depart from the rules of common law which are so nicely constructed and so artificially connected together that the least breach in any one of them disorders for a time the texture of the whole. Innumerable frauds and perjuries were quickly introduced by this parliamentary method of inheritance, for so loose was the construction made upon this act by the courts of law that bare notes in the handwriting of another person were allowed to be good wills with the statute. To remedy which, the statute of frauds and perjuries, 29 Car. 11 (1677), directs that all devises of lands and tenements shall not only be in writing but signed by the testator or some other person in his presence and by his express direction, and be subscribed, in his presence by three or four credible witnesses. And a solemnity nearly similar is requisite for revoking a devise.

QUESTIONS

1. What is meant by a title by devise? a title by inheritance?
2. To perform well its functions in our economic society, is it necessary that ownership in land should possess the qualities of devisability and inheritability?

3. A dies intestate, leaving real and personal property. To whom does the title to each go upon A's death?
4. A by will leaves land and stock in a corporation to B. Upon the death of A in whom does the title to each vest?
5. Trace briefly the development of transferability by will; by inheritance.
6. How do you account for the fact that land came earlier to be transferable freely by act of parties *inter vivos* than by will?
7. In what way did the development of *uses* affect the power of an owner to dispose of his lands by will?
8. Examine the statutes of some state in which you are interested and make a brief digest of the laws governing the descent of land in case of intestacy. Compare such rules with the canons of descent laid down by Blackstone.
9. What were the provisions of the Wills Act of 1540 in relation to the transfer of land by will? What restrictions were placed on the devising of property by the Statute of Frauds of 1677?
10. Examine the statutes of some state in which you are interested and make a brief digest of the laws relating to the transfer of property by will.

III. TITLE BY ACT OF PARTIES INTER VIVOS

A[1]

The ordinary *assurances* (at early common law) were, first, a *feoffment*, which passed the immediate freehold, being a visible transfer of the possession or seisin of the feud, by the ceremony (technically called *livery of seisin*) of delivering upon the land, in the presence of witnesses, a detached portion of the soil, or some other symbol; a solemn investiture, which, while the art of writing was rare, supplied the only evidence of the transaction, and which, although written evidence was afterward required by statute, still continued to be the essence of the conveyance. Secondly, an *exchange*, by which two owners, equal in regard to the quality of their interests bartered land for land, completing the mutual transfer, where the exchange was of lands in possession, by entry without livery (notwithstanding that the freehold was concerned) and, except in particular cases, without deed. Thus A, seised in possession for life or in fee of Blackacre, agreed to give it to B, in exchange for Whiteacre, of which B was also seised in possession for life or fee; each party entered on the other's land, and the effect was equivalent to that of reciprocal feoffments. Thirdly, a *lease* (or *demise*) by which a term of years was derived out

[1] 1 Hayes, *Conveyancing* (5th ed.) pp. 24–27.

of some greater estate and which was completed by the actual entry of the lessee upon the land. Fourthly, a *release*, which enlarged the interest of a tenant for life or years by superadding the expectant interest of the next remainderman or of the reversioner, or a portion of that interest, and which, as the ceremonies of livery and entry were inapplicable, was effected by the solemnity of a deed (i.e., an instrument under seal). Thus A, seised for life or only possessed for a term of years with remainder or reversion to B in fee, on purchasing the remainder or reversion accepted a release from B and so enlarged his (A's) previous estate to a fee. Fifthly, a *surrender*, by which a tenant for life or years yielded up or restored his interest to the person next in remainder or reversion, the law dispensing with livery and entry but in some cases requiring a deed. Thus A, seised or possessed for life or for years with remainder to B in fee, surrendered his interest to B whose fee absorbed the surrendered interest, and whose right to the enjoyment was consequently accelerated. Sixthly, a *grant*, by which the interest under a remainder or reversion was aliened to a stranger (i.e., a person incapable, from not being previously in the tenancy, of accepting a *release* or a *surrender*) and which, since a remainder or reversion did not admit of livery or entry, the law required not only to be made by *deed*, but to be perfected by the *attornment* or submission of the particular tenant to the grantee as his future lord. Seventhly, an *assignment*, by which a term of years or any other interest less than freehold already created was transferred to a stranger, who, as the ancient law concerned chiefly about the dignity of the freehold took small account of such inferior interests, needed no deed or other solemnity to perfect his title.

This system of conveyancing distinguished between transfers of the present possession and transfers of the present right to the future possession; also between the possession or rather the seisin, of the freeholder and the possession of the mere farmer or occupier; and again, between transfers to persons already connected in point of tenure with the land, and transfers to mere strangers prescribing solemnities, differing in their nature and degree, according to the exigencies of the several cases, as livery, entry, attornment, deed; solemnities by which, in the simplicity of these times, the alienation was rendered sufficiently notorious and certain. Writing was necessary only where a *deed* was necessary, and though in later times the legislature, to prevent the mischiefs incident to verbal testimony, enjoined writing in all transactions concerning land (except leases for

a very short term, at a given *quantum* of rent), yet, as sealing was not enjoined, a *deed* is generally necessary at this day only where it was necessary at the common law.

The list of common assurances of the realm will be complete, if we add assurances by matter of record. These were first, a *fine* which bound the interests of married women and, with the aid of the statute law, barred adverse rights and defeated the succession of heirs in tail, secondly, a recovery of force to disappoint as well heirs in tail as all posterior claimants and to cut the knot of the strictest settlement. Fines and recoveries were suits in the Court of Common Pleas, by which a title was gained under the sanction of solemn proceeding on record. These, in process of time, came to be considered as merely modes or forms of conveyance, but endued with extraordinary efficacy and surrounded with much technical mystery. In this state they continued to survive the reasons and the learning on which they were originally founded till a recent statute totally abolished them, transferring their real valuable function to a conveyance by deed, attended with certain forms of acknowledgment or enrolment or both.

B[1]

Let us now turn our attention to the means of conveying a freehold of land—what the law requires to effect a valid transfer from one person to another of an estate of freehold. This has always been and still is a formal matter; mere expression of intention will not suffice to transfer freehold property at law, unless the requisite forms be duly observed. These forms are not the same now as they were in earlier times. By the common law delivery of possession was principally necessary to effect the conveyance of a freehold, while at the present day the chief requisite is a deed. But no one can hope to exercise the modern conveyancing art with understanding, without some knowledge of the early law. For the whole modern law of real property is nothing but a tangle of heterogeneous devices for escaping the effect of the common law rules regarding land. And it will yield up its reason to no one who lacks the patience to learn its history. I would therefore entreat the student to lay aside the notion that the study of what is obsolete in practice must necessarily be waste of time, and will beg him again to consider with me the law of bygone days.

By the common law a freeholding of land was chiefly transferable by *feoffment* with *livery of seisin;* that is, by the gift of a freehold estate

[1] Taken by permission from Williams, *Real Property* (20th ed.), pp. 143–47.

n the land coupled with formal delivery of possession. Feoffment is properly the gift of a *fief* or *fee*—such as was usually conferred in the days of subinfeudation—but the word came to be applied to the gift of any freehold estate. Seisin, as we have seen, originally meant any kind of possession but was not afterward used to denote any but freehold possession—the possession recoverable in real or mixed actions. At common law a feoffment need not have been put in writing; it was sufficient to express the gift by word of mouth; but formal livery of seisin was absolutely necessary to perfect the gift. This was of two kinds: livery in deed and livery in law. Livery in deed was performed on the land to be conveyed by the person making the *feoffment* (*called the feoffor*) expressing by appropriate act and words, or words alone, his intention to deliver seisin of the land to the *feoffee*, or person to be enfeoffed, and yielding up vacant possession thereof accordingly. And it was requisite, in order to secure the delivery of vacant possession to the feoffee, that all persons who had any estate or possession in the land, of which seisin was delivered, should either join in or consent to making the livery or be absent from the premises. If a feoffment were made of different lands lying scattered in the same county (as was usually the case in the days of common fields) livery of seisin of any parcel in the name of the rest was sufficient for all, if all were in the complete possession of the same feoffor; but if they were in several counties there must have been as many liveries as there were counties. For if the title to these lands should come to be disputed, there must have been as many trials as there were counties, and the jury of one county are not considered judges of the notoriety of a fact in another. Livery in *law* was made, not *on* land, but in *sight* of it only, by the feoffor, telling the feoffee to enter and take possession. If the feoffee entered accordingly in the lifetime of the feoffor, this was a good feoffment; but if either the feoffor or feoffee died before entry, the livery was void. This livery was good, although the land lay in another county; but it required always to be made between the parties themselves and could not be deputed to an attorney, as might livery in deed. The word *give* was the apt and technical term to be employed in a feoffment; its use arose in those times when gifts from feudal lords to their tenants were the conveyances principally employed.

Besides livery of seisin it was necessary, whether a feoffment were made with or without writing, that the estate to be taken by the

feoffee should be marked out or *limited* as it is called; that is, that the extent of the feoffee's interest should be ascertained by the proper technical words. Thus, if it were intended to convey an estate of inheritance to the feoffee, it was essential that the gift should be made to him and his *heirs*, or to him and the heirs of his body, according as it were desired to limit an estate in fee simple or fee tail. In the latter case, words of procreation, such as "of his body," were necessary, as well as words of inheritance (*heirs*); for a gift to man and his heirs male conferred on him an estate in fee simple and not in tail, there being no words to ascertain the body out of which such heir should issue; and an estate in lands descendible to male heirs only, in entire exclusion of females, is unknown to the English law. If the land were given to the feoffee simply, without further words, we have seen that he would take an estate for his life only. And the same result would follow if it were attempted to confer on him a larger estate without using the proper technical words. Thus, if lands were given to a man to have and to hold *to him forever* or to him *and his assigns* forever, he had but an estate for life for want of the word *heirs*. For the same reason a gift to a man *and his seed*, or to him *and his offspring*, or to him *and the issue of his body*, would only confer upon him a life estate and not an estate tail. This necessity of using the word *heirs* to mark out or limit an estate in fee seems to have been derived from the times before the alienation of land was freely permitted, when the tenant's heir was the only person who could succeed to his estate. As we have seen, a gift of land would then confer no fee, unless an intention were expressed that the donee's heir should succeed him. And though tenants in fee simple were afterward enabled to dispose of their lands, so as to defeat the expectation of their heirs, the liberty so gained was treated as incident to their estates. So that what remained essential on the gift of a fee simple, was to use apt words to confer a hereditary estate, to which the law would annex the power of alienation. But it was not necessary, after the statute of *quia emptores*, expressly to confer an *assignable* estate. And though in later times it became a common form to convey land to a purchaser, to hold to him *his heirs and assigns forever*, yet the word *heirs* alone gave him a fee simple, of which the law enabled him to dispose; and the remaining words *and assigns forever* had no conveyancing virtue at all, but were merely declaratory of that power of alienation which the purchaser would have possessed without them.

C[1]

Contracts creating uses were now frequently substituted for conveyances of the land. Under the old law alienation was rare—when a sale did take place, the land was conveyed at once by open delivery to the purchaser. But uses introduced the practice of making an agreement to sell, which bound the conscience of the vendor, who, continuing in the legal possession, was considered as holding it to the use of the vendee. Equity would not enforce a gratuitous agreement (*nudum pactum*), but lent its aid to a purchaser who gave a valuable consideration in money or money's worth. The existence of that necessary ingredient was implied in the very name of the transaction, a bargain and sale.

Sometimes the legal owner, desirous of settling his estate on marriage, or of fixing it in his family, covenanted to hold and dispose of the land to uses in conformity with the intended destination, instead of making either a direct legal settlement upon the objects, or a legal conveyance to trustees for their benefit. Equity enforced the obligation, so far as the uses were sustained by the consideration of marriage or of relationship in blood, but no farther. An engagement of this nature was called a covenant to stand seised.

Through the medium of such contracts, raising uses without any change of the legal possession, the purposes of alienation and settlement were accomplished. In both instances the land remained in the contracting owner, in the bargainor, or covenantor, the whole effect of the transaction being the creation of an equitable right by charging his conscience; in both instances, too, the appropriate consideration was essential to the validity of the use. But, at the common law which regarded the solemnity and not the consideration, the act rather than the inducement, a conveyance, being a solemn transfer of the land itself, was effectual though purely voluntary. Upon a legal conveyance, indeed, the rent and services to be paid and performed by the grantee, might be deemed sufficient, without more, to furnish a valuable consideration. And where the land was actually conveyed at law, even equity held uses gratuitously declared upon that convey ance to be valid. If, therefore, A, the legal owner, moved by mere friendship or good will, conveyed by feoffment or by any other common-law assurance to B, to the use of C, then, as A had parted with the legal possesson and B had accepted it expressly for the benefit of C,

[1] 1 Hayes, *op. cit.*, pp. 37–39.

the donation was complete in regard to A, while the conscience of B was clearly charged with the use.

Thus, two different modes of creating uses were established: the one producing its effect by engrafting the equitable right upon an actual transfer to a stranger of the legal possession, as when A conveyed to B to the use of C; and the other, by converting the owner of the land and author of the use into a trustee, without any disturbance of the legal possession, as where A *contracted* that B should have the use. This distinction is material, as will be shown hereafter, with reference to the classification of modern conveyance.

D[1]

We now proceed to consider what changes the statute (of uses) produced in the modes of conveyance.

Bargains and sales which before the statute were substantial dispositions of the equitable ownership, raising a use in favor of the purchaser on the ground of a valuable consideration paid by him, were now resorted to merely as instruments for raising such a use as would attract the statute, but to the raising of which (since uses had passed into mere forms of legal limitation) neither any beneficial interest in the bargainor nor any consideration esteemed valuable and actually moving from the bargainee was requisite. The courts of law, as well in this instance as in the instance of a use on a use, rejected all equitable ingredients, and consistently with their general view of the statute reduced the transaction to a mere mode or form of conveyance. When, therefore, A, the legal owner, holding either in his own right or as a mere trustee for B, bargained and sold to C for five shillings expressed to be paid by C to A (the semblance of value and the allegation of payment being still requisite), such a use as satisfied the statute or at least its expounders arose in favor of C, who was immediately invested with the legal estate. The practice of expressing (for the money was never in fact paid) a *nominal* consideration of five or ten shillings in deeds was at length extended, from ignorance or disregard of its origin and peculiar use, to every kind of transfer of every species of property.

As to covenants to stand seised, the same consideration of blood or marriage which was necessary to raise the use before the statute was necessary still, but no beneficial interest in the covenantor was required, for if he had the legal ownership, though merely as trustee, the use would spring up and possession would follow.

[1]Hayes, *op. cit.*, pp. 74–76.

In short, bargains and sales, and covenants to stand seised, which, before the statute, were real contracts passing the beneficial interest, were now employed without any regard to that interest as technical vehicles for conveying the land at law. The statute had the effect of adding the forms of such contracts to the list of legal assurances. Of the practical importance of the conveyance by bargain and sale we shall presently speak. Covenants to stand seised fell into neglect; for, as no use could arise upon such a covenant in favor of strangers (i.e., persons not within the marriage consideration, nor of the blood of the covenantor), it was incapable of adaptation to the objects of a modern settlement which required the limitation of legal interests to trustees for various purposes, as the raising of jointures and portions and also the insertion of powers of appointing uses to lessees, purchasers, and others.

It has already been observed that, before the statute, uses were created either by changing the possession, as when A conveyed the land to B to the use of C, or, without changing the possession, as when A bargained and sold, or covenanted to stand seised of the land to the use of C. And after the statute, legal conveyances were divided into those which took effect by way of transmutation of possession and those which owed their operation exclusively to the doctrine of uses. Bargains and sales, and covenants to stand seised which did not affect to disturb the possession, and which, therefore, before the statute, had no operation at law, now conveyed the land itself by force of the statute. To illustrate the distinction between the two classes of assurances—upon a bargain and a sale, made after the statute, by A to B, nothing passed under the bargain and sale but the *use*—it was the *statute* which transferred to B the possession of the land. But when A conveyed the land by feoffment to C, the *conveyance* transferred the possession to C, and if on such possession (or, technically speaking *seisin*) a use was declared in favor of B, then the possession passed to him, in the same instant, under the *statute*.

The legislature, observing that a mere contract for sale, value being given, raised a use and, with the help of the statute, changed the possession, and consequently apprehending that land would be conveyed from man to man without form or solemnity, passed another statute, the Statute of Enrolments, 27 Hen. 8, c. 16, which denied effect at law to such contracts in regard to *freehold* interests, unless made by deed indented, and enrolled within six (lunar) months from the date. A contract for the sale of land so perfected, was called a bargain and sale enrolled.

E[1]

It has been already explained that, in the view of the early law, a lease of land for a term of years was a matter of contract rather than of transfer of property; and, for the purpose of an action for the recovery of the land, the possession of the lessee was that of a mere bailiff for his lessor, who remained seised of the freehold. Still, after a lessee for years had actually entered into possession of the land under his lease—and entry, in ancient times, was absolutely necessary to make a complete lease—the relative position of the parties was substantially altered. The lessor's proprietary interest in the land, though technically it remained a freeholding, was divorced from actual possession; thus it became a mere right, an incorporeal hereditament. If, therefore, the lessor wished to transfer his proprietary right to the lessee, a feoffment with livery of seisin would have been out of place between them, for the essential part of this mode of assurance was the transfer of actual possession made by the livery of seisin; and it was impossible to transfer to the lessee the actual possession which he already enjoyed. In this case, it is obvious that the end desired was the transfer of a right to land, without the possession of anything corporeal and, as we have seen, the common law required this to be accomplished by the delivery of a sealed writing, that is by deed. And a deed by which a freeholder conveyed all his estate in land to one who was in actual possession thereof with his privity was termed a release. To a lease and release of this kind, it is obvious that the same objection applies as to a feoffment—the inconvenience of actually going on the premises is not obviated, for the tenant must enter before he can receive the release. In the very early periods of our history, this kind of circuitous conveyance was, however, occasionally used. A lease was made for one, two, or three years, completed by the actual entry of the lessee for the express purpose of enabling him to receive a release of the inheritance, which was accordingly made to him a short time afterward. The lease and release, executed in this manner, transferred the freehold of the releasor as effectually as if it had been conveyed by feoffment. But a lease and release would never have obtained the prevalence they afterward acquired had not a method been found out of making a lease, without the necessity of actual entry by the lessee.

The Statute of Uses was the means of accomplishing this desirable object. This statute, it may be remembered, enacts, that when any person is seised of lands to the use of another, he that has the use

[1] Taken by permission from Williams, *Real Property*, 20th ed. pp. 195–201.

shall be deemed in lawful seisin and possession of the lands, for the same estate as he has in the use. Now we have seen that, before the Statute of Uses, if a bargain were made for the sale of an estate, and the purchase money paid, but no feoffment were executed to the purchaser, the Court of Chancery considered that the estate ought in conscience immediately to belong to the person who paid the money, and, therefore, held the bargainor or vender to be immediately seised of the lands in question to the use of the purchaser. This proper and equitable doctrine of the Court of Chancery had rather a curious effect when the Statute of Uses came into operation, for, as by means of a contract of this kind the purchaser became entitled to the use of the land, so, after the passing of the statute, he became at once entitled, on payment of his purchase money, to the lawful seisin and possession—or rather, he was deemed really to have, by force of the statute, such seisin and possession so far at least as it was possible to consider a man in possession who in fact was not. It consequently came to pass that the seisin was thus transferred from one person to another by a mere *bargain and sale*, that is, by a contract of sale and payment of money without the necessity of a feoffment, or even a deed.

The mischievous results of the statute, in this particular, were quickly perceived. The notoriety in the transfer of estates, on which the law had always laid much stress, was at once at an end; and it was perceived to be very undesirable that so important a matter as the title to landed property should depend on a mere verbal bargain and money payment, or *bargain and sale*, as it was termed. Shortly after the passing of the Statute of Uses it was accordingly required by another Act of Parliament (Statute of Enrolments), passed in the same year, that every bargain and sale of any estate of inheritance or freehold should be made by deed indented and enrolled, within six months (which means lunar months) from the date in one of the Courts of Record at Westminster, or before the *custos rotulorum* and two justices of the peace and the clerk of the peace for the county in which the lands lay, or two of them at least, whereof the clerk of the peace should be one. A stop was thus put to the secret conveyance of estates by mere contract and payment of money. For a deed entered on the records of the court is of course open to public inspection; and the expense of enrolment was in some degree a counterbalance to the inconvenience of going to the lands to give livery of seisin. It was not long, however, before a loophole was discovered in this latter statute, through which, after a few had ventured to pass, all

the world soon followed. It was perceived that the Act spoke only of estates of *inheritance* of *freeholds* and was silent as to bargains and sales for a mere term of years, which is not a freehold. A bargain and sale of lands for a year only was not therefore affected by the Act, but remained still capable of being accomplished by word of mouth and payment of money. The entry on the part of the tenant required by the law was supplied by the Statute of Uses, which, by its own force, placed him in legal intendment in possession for the same estate as he had in the use, that is, for the term bargained and sold to him. And as any pecuniary payment, however small, was considered sufficient to raise a use, it followed that if A, a person seised in fee simple, bargained and sold his lands to B, for one year in consideration of ten shillings paid by B to A, B became in law at once possessed of an estate in the lands for the term of one year, in the same manner as if he had actually entered on the premises under a regular lease. Here, then, was an opportunity of making a conveyancy of the whole fee simple, without livery of seisin, entry, or enrolment. When the bargain and sale for a year was made, A had simply to release by deed to B and his heirs, his, A's, estate and interest in the premises and B became at once seised of the lands for an estate in fee simple. This bargain and sale for a year, followed by a release, is the modern conveyance by *lease and release*—a method which was first practiced by Sir Francis Moore, a serjeant-at-law, at the request, it is said, of Lord Norris, in order that some of his relations might not know what conveyance or settlement he should make of his estate; and although the efficiency of this method was at first doubted, it was, for more than two centuries, the common means of conveying lands in this country. It will be observed that the bargain and sale (or lease as it was called) for a year derived its effect from the Statute of Uses; the release was quite independent of that statute, having existed long before and being as ancient as the common law itself. The Statute of Uses was employed in the conveyance by lease and release only for the purpose of giving to the intended releasee, without his actually entering on the lands, such an estate as would enable him to receive the release. When this estate for one year was obtained by the lease, the Statute of Uses had performed its part and the fee simple was conveyed to the releasee by the release alone. The release would, before the Statute of Uses, have conveyed the fee simple to the releasee, supposing him to have obtained that possession for one year, which, after the statute, was given him by the lease. After the passing of the Statute of Frauds

it became necessary that every bargain and sale of lands for a year should be put into writing, as no pecuniary rent was ever reserved, the consideration being usually five shillings, the receipt of which was acknowledged, though in fact it was never paid. And the bargain and sale or lease for a year was usually made by deed, though this was not absolutely necessary. It was generally dated the day before the date of the release, though executed on the same day as the release, immediately before the execution of the latter. On a conveyance by release from a freeholder in fee to his lessee for years in possession of the land, whether by entry or under the Statute of Uses, it was necessary as it was in a feoffment that the estate taken by the latter should be duly marked out; so that he would take no fee even though the lessor released *all his estate* to him, unless the estate were released to him and his heirs.

This cumbrous contrivance of two deeds to every purchase continued in constant use down to the year 1841, when the Act was passed to which we have before referred. This Act provided that every deed of release of a freehold estate, which should be expressed to be made in pursuance of the Act, should be as effectual as if the releasing party had also executed, in due form a lease for a year, for giving effect to such release, although no such lease for a year should be executed.

F

The early common-law modes of conveying estates in land, however adequate they may have been for a military and agricultural England, proved inadequate for a rapidly expanding commercial and trading nation and gradually gave way to the newer modes arising in connection with the doctrine of uses and, later, under the Statute of Uses. They in time ceased to serve fully the needs of the nation and were supplemented, and in some degree, supplanted, by statutory modes of conveyancing. In England, for instance, it is provided "that all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery." Similar changes in the law have come about by statutory provisions in the various states in this country. The following provisions from the statutes of the state of Illinois are illustrative and typical of modern statutory methods of transferring estates in land by act of the parties *inter vivos:*

"Be it enacted by the People of the State of Illinois, represented in the General Assembly, That livery of seizin shall in no case be

necessary for the conveyance of real property; but every deed, mortgage or other conveyance in writing, not procured by duress, and signed and sealed by the party making the same, the maker or makers being of full age, sound mind, and dis-covert, shall be sufficient, without livery of seizin, for the giving, granting, selling, mortgaging, leasing or otherwise conveying or transferring any lands, tenements or hereditaments in this state, so as, to all intents and purposes, absolutely and fully to vest in every donee, grantee, bargainee, mortgagee, lessee, or purchaser, all such estate or estates as shall be specified in any such deed, mortgage, lease or other conveyance. Nothing herein contained shall be so construed as to divest or defeat the older or better estate or right of any person or persons, not party to any such deed, mortgage, lease or other conveyance.

"In all deeds whereby any estate of inheritance in fee simple shall hereafter be limited to the grantee and his heirs, or other legal representatives the words 'grant,' 'bargain,' and 'sell' shall be adjudged an express covenant to the grantee, his heirs, and other legal representatives, to wit: that the grantor was seized of an indefeasible estate in fee simple, free from encumbrances done or suffered from the grantor, except the rents and services that may be reserved, as also for quiet enjoyment against the grantor, his heirs and assigns unless limited by express words contained in such deed; and the grantee, his heirs, executors, administrators and assigns, may, in any action, assign breaches, as if such covenants were expressly inserted: *Provided, always*, that this law shall not extend to leases at rack-rent, or leases not exceeding one and twenty years, where the actual possession goes with the lease.

"Deeds for the conveyance of land may be substantially in the following form:

> "The grantor (here insert the name or names and place of residence), for and in consideration (here insert consideration) in hand paid, conveys and warrants to (here insert the grantee's name or names) the following described real estate (here insert description), situated in the county of———, in the state of Illinois.
>
> "Dated this———day of———A.D. 18—
>
> A.B. (L.S.)

"Every deed in substance in the above form, when otherwise duly executed, shall be deemed and held a conveyance in fee simple, to the

grantee, his heirs or assigns, with covenants on the part of the grantor, (1) that at the time of the making and delivery of such deed he was lawfully seized of an indefeasible estate in fee simple, in and to the premises therein described, and had good right and full power to convey the same; (2) that the same were then free from all encumbrances; and (3) that he warrants to the grantee, his heirs and assigns, the quiet and peaceable possession of such premises, and will defend the title thereto against all persons who may lawfully claim the same. And such covenants shall be obligatory upon any grantor, his heirs and personal representatives, as fully and with like effect as if written at length in such deed.

"Quit claim deed may be, in substance, in the following form:

> "The grantor (here insert grantor's name or names and place of residence), for the consideration of (here insert consideration), conveys and quits claim to (here insert grantee's name or names) all interest in the following described real estate (here insert description), situated in the county of———, in the state of Illinois.
>
> "Dated this———day of———, A.D. 18—.
>
> A.B. (L.S.)

"Every deed in substance in the form prescribed in this section, when otherwise duly executed, shall be deemed and held a good and sufficient conveyance, release and quit claim to the grantee, his heirs and assigns, in fee of all the then existing legal or equitable rights of the grantor, in the premises therein described, but shall not extend to after acquired title unless words are added expressing such intention.

"Deeds, mortgages, powers of attorney, and other instruments relating to or affecting the title to real estate in this state, shall be recorded in the county in which such real estate is situated, but if such county is not organized, then in the county to which such unorganized county is attached for judicial purposes.

"All deeds, mortgages, and other instruments of writing which are authorized to be recorded, shall take effect and be in force from and after the time of filing the same for record and not before, as to all creditors and subsequent purchasers, without notice; and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers without notice, until the same shall be filed for record."

QUESTIONS

1. What were the early common-law modes of conveying interests in land? What in general were the characteristics of these modes of conveyance?
2. Describe the process of conveying land by the *feoffment* with *livery of seisin*. What interests in land could be transferred by feoffment? Was a writing of any kind necessary for a conveyance of this kind?
3. How were reversions, vested remainders and other incorporeal hereditaments conveyed at early common law?
4. "Contracts creating uses were now frequently substituted for conveyances of land." What is meant by this statement?
5. "Uses raised by a conveyance operating by transmutation are distinguished from uses raised without any such transmutation." How were uses raised without transmutation or possession? How were they raised with transmutation of possession?
6. X enfeoffs B of Blackacre to the use of C. What was the effect of this transaction before and after the Statute of Uses?
7. Explain the method by which an interest in land could be conveyed by a *bargain and sale* before and after the Statute of Uses.
8. A, in consideration of a peppercorn, bargains and sells Blackacre to B. What is the effect of this transaction before and after the Statute of Uses?
9. A, without consideration, bargains and sells Blackacre to B. What is the effect of this transaction before and after the Statute of Uses?
10. Did the bargain and sale have to be evidenced by a written document of any kind? Did the transaction have to be registered or recorded?
11. Explain the operation of the *covenant to stand seised* before and after the Statute of Uses.
12. Explain the operation of the deed of *lease* and *release*. What gave this mode of conveyance such popularity in England after its introduction?
13. To what extent, if any, are early common-law modes of conveyancing operative at the present time? To what extent are the modes of conveyancing arising under the Statute of Uses operative now?
14. What in general are the provisions found in modern statutes regulating the conveyances of estates in land?
15. Examine the statutes of some state in which you are interested and make a brief digest of the laws relating to the forms of conveying land.

TABLE OF CASES

Alger v. *Thatcher*, 348
Anonymous, 376
Arkansas Valley Co. v. *Mining Co.*, 366
Allee v. *Fink*, 411

Bailey v. *Austrian*, 312
Baker v. *Higgins*, 379
Beach v. *Hancock*, 114
Bell v. *Josselyn*, 468
Bernshouse v. *Abbott*, 465
Biggers v. *Owen*, 261
Bird v. *Munroe*, 339
Bishop v. *Eaton*, 294
Borden v. *Boardman*, 309
Boston Ice Co. v. *Potter*, 249
Bowman v. *Wade*, 336
Boyers & Co. v. *Duke*, 238
Brauer v. *Shaw*, 263
Brewster v. *Warner*, 501
Bromage v. *Prosser*, 161
Brookshire v. *Brookshire*, 478
Brow v. *Hathaway*, 163
Brown v. *Kendall*, 205
Bullitt v. *Farrar*, 146
Burgesser v. *Wendel*, 308
Butler v. *Telephone Co.*, 126
Butterfield v. *Byron*, 394

Callisher v. *Bischoffsheim*, 326
Cardon v. *McConnell*, 156
Chambers v. *Seay*, 481
Chapin v. *Freeland*, 514
Chappell v. *Jardine*, 552
City of Chicago v. *Sturges*, 213
Claflin v. *Linheim*, 485
Clark v. *Marsiglia*, 390
Collen v. *Wright*, 470
Collyer v. *Moulton*, 398
Commings v. *Heard*, 405
Coursolle v. *Weyerhauser*, 84

D'Arcy v. *Lyle*, 446
Davies v. *Mann*, 202
Dawkins v. *Sappington*, 246
Deaderick v. *Oulds*, 495
Dodge v. *Hopkins*, 433
Domasek v. *Kluck*, 459
Donnelly v. *Currie Hardware Co.*, 245
Dooling v. *Publishing Co.*, 153
Duplex Safety Boiler Co. v. *Garden*, 372
Durfee v. *Jones*, 499
Dusenbury v. *Hoyt*, 330

Eldorado Jewelry Co. v. *Darnell*, 270
Eliason v. *Henshaw*, 297
Emery v. *Ohio Candle Co.*, 352
Erie Railway Co. v. *Union Locomotive Co.*, 356
Estate of Taylor & Co., 344
Evans v. *Davidson*, 449

Fisher v. *Seltzer*, 252
Fitts v. *Hall*, 99
Fletcher v. *Rylands*, 210
Fred v. *Traylor*, 172

Galusha v. *Sherman*, 358
Garvey v. *Jarvis*, 423
Gilman v. *Noyes*, 198
Good v. *Cheesman*, 322
Graves v. *Horton*, 414
Green v. *Green*, 94
Gregory v. *Lee*, 97

Hall v. *Harper*, 437
Hamer v. *Sidway*, 304
Hanna v. *Phelps*, 506
Harley v. *State*, 108
Hayden v. *Bradley*, 374
Heath v. *Stoddard*, 420
Heaton v. *Angier*, 401
Henry v. *Dennis*, 149
Henry v. *State*, 508
Higgins v. *Lessig*, 236
Hobart v. *Hagget*, 208
Hobson v. *Hassell*, 475
Hunt v. *Livermore*, 377

Jaffray v. *Davis*, 318
Johnson v. *Dodge*, 417

Kayton v. *Barnett*, 461
Keighley, Maxsted & Co. v. *Durant*, 425
King v. *Patterson*, 167
Kingsley v. *Davis*, 463
Knauss v. *Gottfried Krueger Brewing Co.*, 442
Komorowski v. *Krumdick*, 455
Kromer v. *Heim*, 402

Laidlaw v. *Sage*, 181
Laidlaw v. *Sage*, 186
Lane v. *Atlantic Works*, 200
Laverty v. *Snethen*, 137
Leopold v. *Salkey*, 381
Lewis v. *Jewell*, 364
Lingenfelder v. *Wainwright Brewing Co.*, 314
Lloyd v. *Scott*, 354
Loring v. *City of Boston*, 256
Lumley v. *Gye*, 178
Lyon & Co. v. *Kent, Payne, & Co.*, 410

Manzoni v. *Douglas*, 195
Medbury v. *Watson*, 142
Minneapolis & St. Louis Ry. v. *Columbus Rolling Mill*, 254

Nolan v. *Whitney*, 370
Norrington v. *Wright*, 385

Pickert v. *Marston*, 453
Pole v. *Leask*, 452
Prescott v. *Jones*, 277
Purner v. *Piercy*, 334

Raffles v. *Wichelhaus*, 273
Rann v. *Hughes*, 301
Rhoades v. *Blackiston*, 472
Rice v. *Wood*, 439
Ricketts v. *Scothorn*, 267
Ridden v. *Thrall*, 524
Royal Insurance Co. v. *Beatty*, 290
Rupley v. *Daggett*, 275
Ryder v. *Hathaway*, 521

Satanita, The, 235
Schnell v. *Nell*, 306
School District v. *Howard*, 392
Scranton v. *Stewart*, 92
Scribner v. *Beach*, 119
Seaver v. *Phelps*, 105
Sheffill v. *Van Deusen*, 159
Shuey v. *United States*, 266
Silsbury v. *McCoon*, 516
Smith v. *London Ry.*, 193
Spade v. *Lynn & Boston Ry.*, 115
Spencer v. *Harding*, 242
Steele v. *Marsicano*, 133
Stevens v. *Ludlum*, 362
Strong v. *Sheffield*, 328
Sweeney v. *Franklin Fire Ins. Co.*, 342
Swim v. *Wilson*, 130

Tayloe v. *Merchants' Fire Ins. Co.*, 284
Taylor & Co., Estate of, 344
Thomas v. *Winchester*, 122
Thorley v. *Lord Kerry*, 175
Times Publishing Co. v. *Carlisle*, 158
Tobey v. *Wood*, 88
Towle v. *Dresser*, 86

Vaughn v. *Menlove*, 190

Wallis Tobacco Co. v. *Jackson*, 458
Welch v. *Mandeville*, 368
Wentworth v. *Day*, 503
Wheeler & Wilson Mfg. Co. v. *Aughey*, 431
White v. *Corlies*, 281
Windmuller v. *Pope*, 388
Workman v. *Wright*, 427

INDEX

[Figures refer to pages. C and CC refer to "case or cases beginning on page or pages," as CC 423, 425, means cases beginning on pages 423 and 425.]

Abatement, plea in, 45, 49
Absolute, rule made, 57
Acceptance, *see* Contracts: acceptance
Accident, as excuse for injury done, C 205
Accord and satisfaction, *see* Contract: discharge of
Act, intentional, what is, CC 181, 205
  Voluntary, as element of responsibility, C 181; *see* Responsibility
  Voluntary, what constitutes, C 181
Actions:
  Forms of, 18–23
  Of contract and tort, distinguished, 23
  Personal, 19
  Real, 19
Acts, for what, actor is responsible, C 205; *see* Responsibility
Adjective law, 10
Admiralty law, 17
Affirmative plea, 45, 46; *see* Plea; Pleas
Agency:
  Agent bound when contracts in own name, C 475
  Agent's authority by ratification, CC 423, 425
    Created how, C 417
    Determined by usage, C 453, C 460
    To buy on principal's credit, CC 455, 458
  Agent's duty to principal, CC 439, 442
    To third persons, C 439
  Agent's liability in tort, C 468
    In trover, C 137
    On warranty of authority, C 470
  Burden of proving, on whom, CC 458, 449
  Commission, agent's right to, CC 439, 442
  Coupled with an interest, C 481
  Created by appearance of authority, C 420
  Creation of relation, C 410–439
  Delegation of powers by agent, C 412
  Double employment in, CC 439, 443
  Duty of agent to principal, C 412
  Effect on third party of unauthorized act of agent, C 433
  Law of, 409 ff.
  May agent act for two principals in same transaction, C 412
  Operation of relation, 439 ff.
  Powers of agent, C 410
  Prevalence of employment of relation, 409
  Principal bound by what kind of signature, C 417
  Principal liable to third person for act of agent, C 449
  Principal's duty to agent, C 446
  Ratification by conduct, C 437
    Discussed, CC 423, 425, 431, 433, 437, 427
    Effect of, C 431, 433
    Of forgery, C 427
  Relation demands assent of both principal and agent, C 414
  Revocation of, effect of, C 481
    When effective, C 485
  Scope of authority of agent, C 420
  Sources of law of, 409–10
  Statements of agent as evidence of authority, C 431
  Termination of, how effected, C 478
  Third person deals with agent at peril, when, C 452
  Undisclosed principal, agent's right to sue on contract for, C 472
    Defenses good against, C 465
    Liable to third party, when, CC 461, 463

Agency (*continued*)
What may principal do through agent, C 410
What necessary to raise relation of, C 414
Who may act as agent, C 410
Alien, contracts of; *see* Contracts
Analysis of cases, 73
Appeal by writ of error, questions open on, 60
Appellate review, 59–64
As affected by statute, 61
As continuation of case, 61
Effect of, 60, 63
Purpose of, 60
Arbitration and award, *see* Contracts: discharge of
Arrest of judgment, motion in, 57
Assault, as a trespass, 27
As trespass to person, 114
In defense of property, when justified, C 119
Assignment of contracts, *see* Contracts: assignment
Assumpsit, action of, 21–23, 24
Action of, development of, 226, 230
A form of case, 31
Auction sale, *see* Contracts
Authorities, citation of in briefs, 63

Bankruptcy, *see* Contracts
Bar, plea in, 45, 49
Bill of exceptions, *see* Exceptions, bill of; also 62, 60
Bodily security protected by law of torts, 114
Breach of contract, *see* Contract: breach of
Brief, use of, 62 ff.
Burden of proof, what is, 55
Business relations, interference with, as a tort, C 178

Canon law, 17
Care reasonable, what is, 192, 207
Care required, affected by circumstances, 206, 207
Case, action on, 28, 30, 31
In assumpsit, 31
In deceit, CC 142, 146
In trover, 31
Case of first impression, 77
Cases, as sources of law, 65
Decide only questions actually put in issue, 67, 72
Decided, as authority, 65, 66
Decision of, as distinguished from opinion in, 70, 71
Dicta in opinion in, effect of, 71
Digest of, form of, 80 and 81
Use of, 79
Doctrines of, 69, 70, 72–74
How to discover, 70
Generalizations from, when justified, 74
Mechanical features of reports of, 67 and 68
Methods of analysis of, 73
Opinion in, as guide to students, 69 and 70
Principles governing use of, 67
Questions to be answered in study of, 69
Rule of law, how deduced from, 70
Syllogism useful in study of, 78, 79
Use of logic and common sense in study of, 75
Uses of study of, in common law system, 65
Value of decisions in, 74–77
What decided by, how to discover, 70
Causal connection of act with responsibility for injury, C 186
Cause, jurisdiction of, distinguished from, of person, 62
Of result complained of, when an act is, C 186
Physical and responsible, distinguished, 189
Proximate, *see* Proximate cause
Chancellor, functions of, 13
Chancery, origin, 13
Charge to jury, 58
Chattels, *see* Personal property; also 493
Choses in action, *see* Personal property
Assignability of, CC 366, 368
Clerk of court, duties of, 58
Comparison of decisions with former decisions, 77 and 78
Composition of creditors, *see* Contracts
Conduct of trial, 58 and 59
Confession and avoidance, 48 and 49

Consent rule, in ejectment, 33
Consideration, *see* Contracts
Constitutionality of statutes, question for courts, 6
Constitutions, as sources of law, 5
Continuance, what is, 58
Contract liability, distinguished from tort liability, 113
Contracts:
Acceptance, *see also* Contracts: offer
Assent necessary to complete CC 270, 273, 275
Binding only when made by one with knowledge of offer, C 246
By mail, when effective C 284
Conduct as, CC 281, 294
Doing what offer asks for, as, C 294
Effect of mistake on, 270, 271, CC 273, 275
Effect of, on offer, C 277
Essentiality of, to contract, 299
How must be made, C 297
Implied from silence or inaction, when, CC 277, 290
Knowledge of, not essential to make effective, CC 284, 294
Meeting of minds or agreement necessary to complete, 272, CC 273, 275
Mental determination as, CC 277 281
Mistake, effect of, on, 270, 271, CC 273, 275
Necessary to complete contract, CC 273, 275, 277, 281
Necessity of communication, C 281
Necessity of words to complete, C 294
Silence as, CC 277, 290
What may constitute, CC 277, 281, 290, 297
What necessary, CC 245, 297
Accord and satisfaction, C 318
Action of, distinguished from action of tort, 23
Agent's, *see* Agency; Statute of Frauds
Aliens', C 108
Assignment of, 366–369, C 366
Effect of, C 368
Assignment of liability under, C 366
Auction sales, 253
Bankruptcy, effect of discharge in, on contract, C 330
Based on promise, 217, 218
Breach of, anticipatory, effect of, C 388
Breach of, effect of, C 390
Breach of, what is, CC 377, 379, 381, 385, 390
By estoppel, C 267
By mail, C 284
Caveat emptor, 253
Classified, 231, 302
Composition of creditors, as contract, C 322
As bar to action by one creditor, C 322
Conditions in, 210
Express, C 372
Implied in, CC 374, 376, 377, 379, 381, 385
Waiver of, C 370
Consent necessary to formation of, C 249
Consideration, cases on, 301 ff
Defined, 304,
Development of doctrine of, 228–231
Divisible, effect of, on contract, C 356
Forbearance to sue, as CC 326, 328
Illegality of, effect of, C 356
In what contracts necessary, C 301
Love and affection as, C 304
Motive as, C 306
Must move from whom, C 309
Necessity of, to form contract, CC 301, 306, 308
Payment of lesser sum as, for discharge of debt, C 318
Payment of small sum of money as, for promise to pay large sum, C 306
Promise as, C 312
Promise of creditors in composition as, C 322
Promise to do what already bound to do as, C 314, at 316
Promise to pay made after bankruptcy as, C 330
Promise to pay part as, for promise to discharge whole, C 318

Contracts (*continued*):
Valuable, what is, CC 306, 308
What may be, CC 304, 308
Continued existence of subject-matter as implied condition to, C 394
Counter offer, effect of, 255
Damages for breach of, may not be increased by continued performance, C 390
Damages for breach of, measured how, 389
Defective agreements as, 333 ff.
Destruction of subject-matter as affecting duty to perform, C 394
Discharge, by accord and satisfaction, CC 401, 402
By agreement, CC 401, 402
By arbitration and award, C 405
By novation, C 401
By release, C 398
Duress, effect of, on, C 358
Effect of deceit on legality of, 218
Effect of misrepresentation of fact on, C 342
Effect of Statute of Frauds on, *see* Statutes
Enforcibility of, what is meant by, C 390
Estoppel, effect of, *see* Estoppel; also 267
Executed and executory, distinguished, 232
Express and implied, distinguished 232
For benefit of third person, C 309
Forbearance to sue on claims honestly believed valid, as consideration, C 326
Formal and simple, distinguished, 231 ff.
Fraud, effect of, on, C 362; *see* Statutes
What constitutes, C 364
Futures, sale of, as gambling contracts, 344
Gambling contracts, effect of, C 344
Test of, 345
History of law of, 220 ff.
Illegality of consideration as affecting, C 356
Importance of formality of, in early law, 221
Impossibility of performance of, effect of, CC 381, 392, 394
Inducement of breach of, as tort, C 178
Infants, contracts of:
Affirmance of, what is, 94
Appointment of attorney, 84
Necessaries, 97
Ratification of land contract of, 92
Ratification of, note 89
Sale of chattels, 86
In restraint of trade, CC 348, 352
Insane persons, contract of, C 105
Insurance, C 342
Introductory topics, 216
Law of, a development, 216 ff.
As foundation of industrial society, 216
Modern, traced, 224 ff.
Reasons for development, 224 and 225
Margin, contracts on, as gambling contracts, 344
Misrepresentation of fact, effect of, on, C 342
Mistake, effect of, on, CC 270, 273, 275
Mutuality of assent necessary, CC 252, 249
Offer:
Acceptance, effect of, on, 270 ff.
Advertisement as, 240, CC 256, 261
Catalogue price as, 240.
Circular letter as, 243, C 242
Distinguished from contract, C 245
Distinguished from quotation, 240
Duration of, CC 256, 255
Effect of circumstances on effectiveness of, C 236
Effect of counter offer on, 255
Effect of withdrawal on, 255
How may be made, C 235
Implied, C 235
In insurance contracts, what is, C 284
In what circumstances binding, C 236
Lapse of time as affecting, C 256

Contracts (*continued*):
May be revoked, C 252
Mistake, effect of, on, C 238
Mistake, in making, effect of, C 238
Must be known to be accepted, CC 246, 249
Not binding until accepted, CC 252, 254
Of reward, CC 246, 261, 266
Reasonable time for duration of, what is, 259
Rejection of, effect of, 255
Revocation, when effective, CC 261, 263, 266
What constitutes, C 267
Who makes at auction sale, C 252
Offeree, position of, 255
Offers for, classified, 233
Of insurance, interest necessary for, C 342
Part performance of, effect of, C 385
Give what rights when subject-matter destroyed, C 394
Performance of, as affected by destruction of subject-matter, C 394
As affected by failure to state that it is the thing bargained for, C 376
As affected by time at which act done, C 385
As condition, CC 377, 379, 381, 385
Instalment, what constitutes, C 385
Should not be completed when, C 390
What constitutes, CC 370, 372, 379
What is, to satisfaction of promisee, C 372
When conditioned on performance of tender by other party, C 377
When due, C 377
When excused, C 381
When is one entitled to, C 379
When notice to promissor a prerequisite to, C 374
Price maintenance contract, C 352
Promise as basis for, *see* Promise; Contracts: consideration, promise as
Release as discharge of, C 398
Repudiation of, effect of, CC 388, 390
Risk of continued existence of subject-matter upon which party, C 394
Satisfaction of promisee, what is performance to, in contract, C 372
Short sales, as gambling, C 344
Statute of Frauds, effect of, on, *see* Statutes
Statute of limitations, promise to pay made after, has run, as contract, C 330
Tender necessary to raise duty of performance in what cases, C 377
Third person's rights under, C 309
Time of performance of, C 385
Unilateral and bilateral, distinguished, 233
Usurious, C 354
Void and voidable, distinguished, 232 ff.
Voidable, effect of, C 270
Contributory negligence, when no defence, C 202
Conversion, *see* Trover
Agent liable for, C 137, at 140
Dealing with goods as, what constitutes, C 133; at, 136
Demand and refusal may not be, 135
Gives no title, 130
Good faith no defense for, 130–132, 140
Misdelivery as, 139
Trover action for damages for, C 130
Unauthorized use of property lawfully held, as, C 137
What may constitute, 130, 131, CC 134, 137, 139
Count, a statement of claim, 47
Courts:
Decisions of, as sources of law, 6
Effect of, 76
Function of, in laying down the law, 6, 67
Guided by custom, 7
Of review, function of, 63; *see* Appellate review
Covenant, action of, 23, 24, 221
Crime, distinguished from tort, 113
Customs, as guide to courts, 7

Damage as element of actionable deceit, C 142

Debt, action of, 20, 23, 24, 222
Deceit:
Action of, maxim of *caveat emptor* as defense to, C 142
Actionable, what constitutes, CC 142, 146
Damage necessary element of action of, C 142
Effect of, on legality of contract, 218; *see also* Contracts: fraud, misrepresentation
Elements of action of, CC 142, 146, 149
False representation of knowledge as, C 146
Statements by owner of property as, 144
Statements of value or price paid as, 143
Who may bring action of, C 149
Decisions of former cases overruled when, 66, 67
Use of, by courts, 66
Declaration:
Answered by plea or demurrer, 44, 47
Content of, 47
Form of, 51
Met by demurrer or plea, 44, 47
Parts of, 47
What is, 44
Defamation: *see* Tort; Defamation; Libel; Slander; Reputation
Action for, reason for, C 158
Actionable, what is, C 153
Defamatory words, what are, 175
Disparagement of goods, not, C 153
Distinguished from abuse, 176
Elements of, CC 159, 161, 163, 167, 172, 175
Remedy for, C 158
Scope of responsibility for, 171
When actionable per se, C 172
What constitutes, 153, 175
Defective agreements, as contracts, 333 ff.
Demand and Refusal, when not conversion, 135
Demurrer:
Defined, 47
Effect of, 44, 46–48
Form of, 53
Judgment on, 45
Must be joined in by adverse party, 45
Purpose of, 46
Special and general, 44, 45, 48
What is, 44
Withdrawal of, 45
Destruction of subject-matter, *see* Contracts
Detinue, action of, 24, 25
Displaced by trover, 25
Dicta ignored when, 71
Dictum, what is, 71
Digest of, form of, 80, 81
Use of, in study of cases, 79
Digging in one's own land, C 210
Disability, personal, 82
Disaffirmance, *see* Contracts: infants
Discharge of contracts, *see* Contracts: discharge
Discharged rule, 57
Discretion, age of, 83; *see* Contracts: infants
Disparagement of goods, not libel, C 153; *see* Slander of title
Dissenting opinions, effect of, 76
Divisions of the law, 8–10
Docket, what is, 58
Doctrine of cases, *see* Cases; *also*, 69
Due process of law in exercise of police power, C 213
Duress, C 358

Ejectment, action of, 32, 126, 127
Ejectment, action of, what must be shown to maintain, 127
Enforcement of rights at law, 18–65
Equity, *see* Chancery
As a system of law, 12
Distinction between remedies of, and those of common law, 14, 16, 17
Origin of, 13, 15–17
Outgrowth and extension of common law system, 15
Preventive powers of, 16
Review in, by appeal, 61
Error in record, effect of, on review, 60
Error, writ of, 60, 61; *see also* Writ of error

Error, writ of (*continued*)
Effect of, 61
Purpose of, 61
Review of action at law on, 61
Estates in land, *see* Real property
Estoppel, *see* Agency; estoppel; *also*, 218, 279, 280, 362
Doctrine of, applied, 268
Effect of, on contract, C 267
Evidence, admissibility of, open on review on exception, 60
Exceptions, bill of, 56, 60, 62
As part of record, 60,
Statutory, 62
Ex parte proceedings, 76

Fact, issue of, 43, 46
Matters of, not subject to review on writ or error, 63
Question of, distinguished from question of law, 54, 55
For jury, 44
How determined, 47
What are immaterial, 74
Facts, in reported cases, *see* Cases, reported
False imprisonment, 28
False representation, action of deceit for, CC 142, 146, 149
First impression, case of, 77
Folkways as sources of law, 4
Forbearance to sue, *see* Contract: consideration; *also*, C 328
Foreseeable consequences of negligence, responsibility for, CC 194, 200
Forms of action, 18–33
Fraud, *see* Statutes; Contracts

General principles of law, how developed, 78
Generalizations from cases, 74
Guaranty, contract of, C 294

Hypothetical cases not decided by courts, 67

Infants, contracts of, *see* Contracts: infants
Torts of, C 99
Injury, responsibility for, how fixed, C 181
Illegality:
Effect of, on contracts, CC 348, 352, 354, 356
Meaning of, in contracts, CC 348, 352, 354, 356
Of consideration, C 356
Impossibility of condition, effect of, 219; *see* Contracts
Instructions to jury, 56
Intent, as element of trespass, C 208
Intervening cause, effect of, on responsibility for negligence, C 200
Issues, how to discover and state, 70
Issues, raised by pleadings, 43

Judge, functions of, 54
Judgment, effect of, 57, 59
On demurrer, 45
Notwithstanding verdict, motion for, 57
Finality of, 59
Jurisdiction, defined, 35
Effect of trial without, 37
How determined, 62
In general, 35–42
Kinds of, 37
Of defendant, notice necessary to, 39, 40
Of person, distinguished from jurisdiction of cause, 62
Over case, 37
Over persons, 36, 37, 62
Over subject-matter, cannot be waived, 38, 62
When may question of, be raised, 39
Whence derived, 36
Jury:
Facts as found by, conclusive, when question properly presented to them, 140
Function of, 44, 54
Instructions to, 56
Report of, verdict of, 59
Verdict of, 56, 59

Knowledge of offer, *see* Contracts: offer; *also*, C 290

Land, *see* Real property
Interest in, what is, under Statute of Frauds, C 334
Legal concept of, 127, 128
Recovered by action of ejectment, 32
Space above, as part of, 128

Last chance doctrine, C 202
Lateral support, duty of, C 210
Law:
Actions at, reviewed by writ of error, 61
Classifications of, 8
Defined, 2
Divisions, 8–10
Equity as a system of, 12
General principles of, how developed, 78
Issue of, 43 and 46
Merchant, 17
Of contracts, *see* Contracts: law of
Origin and nature of, 1–8
Public and private, distinguished, 8
Question of, distinguished from question of fact, 54, 55
For court, 44
Substantive and adjective, distinguished, 10
Systems of, 11–18
Leases, *see* Real property
Legislation, as source of law, 5
Legislature, power of, to impose restrictions on use of private property, 213
Libel, *see* Defamation
Actionable per se, C 153
Slander distinguished from, C 175
Lien, *see* Personal property
Logic, use of, in study of cases, 75

Malice:
In defamation, C 161
In law, distinguished from malice in fact, C 161
What is, 162
When presumed, in defamation cases, C 161
When question for jury, C 161
Misfeasance and nonfeasance distinguished, 228
Misrepresentation, C 146; *see* Contracts: misrepresentation in, C 342
Mistake, *see* Contract
As excuse for conversion, C 208
As excuse for trespass, C 208
Mobs:
Liability of municipality for damage done by, C 213
Motion, for judgment notwithstanding verdict, 57
For new trial, 56, 57
In arrest of judgment, 57
Municipality, liability of, for damage done by mobs, C 213
Mutuality, *see* Contracts

Narration, content of, 47
Necessaries, *see* Contracts: infants; *also*, 97
Negative plea, 45, 46
Negligence, absence of warning is not necessarily, C 195
As responsible cause of injury CC 191, 193, 195, 198, 200
Consequences of, for which liable, CC 122, 191, 193, 198, 200
Contributory, effect of, C 203
Question for jury, C 122
Remoteness as a factor in responsibility for, CC 195, 198
Scope of liability for, CC 122, 191, 193, 198, 200
What is, CC 115, 122, 192
New matter, how presented in pleadings, 49
New trial, application for, 56
Disposal of motions for, not reviewable at common law, 64
Grounds for, 57
How conducted, 63
Motion for, reviewable by statute, 64
No longer discretionary in all cases, 57
Purpose and effect of, 63
New trials, how many permitted, 64
Nisi, rule, 57
Nonresident, service of process on, 62
Nottingham, Earl of, Chancellor, 15, 571
Novation, *see* Contracts: discharge of; *also*, 310

Obiter dictum, 71
Offer, *see* Contract: offer
Opinions of courts, uses of, *see* Cases: opinions in; *also*, 69, 70
Origin and nature of law, 1–8

Parties to actions, how designated, 68
Payment of part of debt as discharge of whole, C 318

Performance of contracts, cases on, 370–398; *see* Contracts; performance of
Person, jurisdiction of, distinct from jurisdiction of cause, 62
Artifical, distinguished from natural, 82
Juristic, 82
Legal, defined, 82
Slave as, 82
Personal disability, 82
Personal property, *see* Property
Acquired how, 511
Acquisition and disposition of, 510–526
Acquisition by gift, 524 ff.
Bailee's lien, 508 ff., 506
Bailee's right to possess, 498, 501 ff.
Chattels classified, 493
Chattels, real and personal, 493
Choses in action as, 494
Choses in possession as, 494
Classes of, 490, 491, 492, 494
Confusion of, 521, ff.
Delivery of, what is, 508, ff.
Finder of, right to possession, 501
Finder's lien on, 503 ff.
Found, who has right to possess, 499
Gifts of, *causa mortis*, 524 ff.
Inter vivos, 524 ff.
Growing crops as, 513
Heirlooms, 491
In animals, 512
Interest in land as, *see* Personal Property: Chattels, real
Intermixture of, 521 ff.
Larceny of, by owner, 509
Lien of finder of, 504
Lien of lodging-house keeper on, 508 ff.
Nature of rights in, 495, ff.
Of alien enemies, 511
Owner of, may trace how far, 516 ff.
Ownership of, by adverse possession, 514 ff.
By wrongful act, 516 ff.
How acquired, 511 ff.
Pledge of, 551 ff.
Possession of, what constitutes, 499 ff., 508 ff.
Purposes of our study of law of, 490
Reward for finding of, effect of offer of, 503 ff.; *see* Contract: offer
Right of finder of, to possession, 504
Right of owner of, to recapture, 521 ff.
Right to possess, 497, 501 ff.
What is, 492, 493
Persons, classified, 82; *see* Person
Defective, 82, 84–110
Law of, 82–110
Physical injury resulting from fright, as a basis for cause of action, C 115
Plea, affirmative, 48
Negative, 48
Use and effect of, 48
What is, 44
Pleadings, 43–53
Defined, 47
Necessity for, 43
On review, 62
Purpose of, 43, 44, 47
Pleas, classes of, 45
Form of, 52
Police power, due process of law in exercise of, C 213
Praecipe, form of, 50
Private property, as an institution, 489; *see* Property
Social effect of institution of, 489, 490
Privilege:
Abuse of, in defamation, 166
In defamation, CC 161, 163, 165, 167, 170
When question for jury, 166
Process, service of, 62
Validity of, open to attack, 40
When necessary to give jurisdiction, 40
Principal and agent, *see* Agency
Promise, *see* Contract: condition, promise
As consideration, C 312
Basis of contract, 217, 218
Binding, what is, 329, 330, C 312
Effect of, 378,
Gratuitous, not enforceable, 329

Promise (*continued*)
Simple, no action for breach of in early law, 221, 223
Why made enforceable, 224, 225
To do what already bound to do, as consideration, C 314, at 316
What is, 217 ff.
Property, *see* Personal property; Private property; Real property
Defense of, as excuse for assault, C 119
Restrictions of use of, C 210
Slander of title of, as injury to, C 156
Subject to rights of others; 191
Trespass to real, what constitutes, C 126
Protected interests, what are, *see* Torts; Contracts; Property
Proximate cause, *see* Responsibility
As element of responsibility, C 198
Public opinion, as guide to courts, 7
Publication in defamation, what is, CC 159, 167
Service of process by, 62

Quasi contract liability, basis of, 113
Distinguished from tort liability, 113
Questions open for review on writ of error, 60
Quotation distinguished from offer, 240

Ratification, *see* Agency; Contracts: infants
Real property, 527–596; *see* Property; Land
Acquisition of title to, by devise and by descent, 578–581
Alienability of, development of, 534 ff.
Allodial tenure of, 530
Canons of descent, 578
Cestqui que use, 540, 541, 542
Common recovery, action of, 536
Conditional fee, 534
Conveyance:
By assignment, 583
By bargain and sale, 588, 589, 592
By common assurances, 582–584
By deed, 583–591, 593
By grant, 583
By lease and release, 582, 590, 592, 593
In modern times, 593, 594
Of fee by word "heirs," 585, 586
To uses, 587, 542–545
Covenant to stand seised, 587
Curtesy, 556
De donis, statute of, 535, 536
Defeasible estates, 551
Development of estates in, 532
Development of modern conveyancing, 584 ff.
Development of ownership of:
At law, 527–539
In equity, 539–545
Doctrine of survivorship in regard to, 560, 561
Doctrine of uses as related to, 540
Dower, 557
Equitable doctrines regarding, 539 ff.
Equitable ownership of, 539 ff.
Equity of redemption, 552
Estates:
At sufferance, 557
At will, 557
For life, 532, 547–576, 554
For years, 557
In fee simple, 527, 548, 549
In fee simple created by word "heirs," 548, 549
In fee simple on condition, 534
In fee tail, 555
Less than freehold, 557
Of freehold, 550, 554
Executory devises of, 566, 567, 568, 569, 575
Feoffee to uses, 540–542
Feudal system of land tenure, 528
Abolished, 531
Fines and recoveries, 584
Formalities of transfer, 584
Future estates in, 564, 566, 567, 568, 569 ff.
Limitations upon creations of, 569 ff.
Growing plants as, 513
Incidents of tenure of, under feudal system, 529, 530, 533
In flowing streams, 512
Joint tenancy of, 560, 559
Jointure, 559

Real Property (*continued*):
Land, defined, 490, 491, 492
Law of, related to feudal system, 527
Lease of, 590
Creates an estate, 557, 558
Livery of seisin, 544, 566, 582, 584
Methods of transfer, 577; *see* Conveyances
Modern law of, traceable to Norman Conquest, 527
Modes of conveying, 582–584
Mortgage of, 551–553
Pledge of, 551
Powers of ownership of, 563 ff.
Quia emptores, statute of, 537
Recording of deeds, effect of, 595
Remainder, defined, 563
Vested and contingent, 564–566
Rents of, origin of, 533
Reversion, defined, 563
Rule against Perpetuities, 570–575
Seisin, 544, 585
Shelley's case, rule in, 550
Shifting use, 568
Springing use, 568
Statute of Frauds, *see* Statutes
Statute of *Quia emptores*, 586
Statute of 32 Henry VIII
Statute of Uses, 542, 543, 588, 589, 590, 591
Tenancy by the curtesy, 556
In common, 559, 560
In fee simple, 547, 548
In severalty, 559
Tenement, 529
Tenure of, under feudal system, 528, 540
Title by act of parties inter vivos, 582–583
By devise and by descent, 578–581
Transferability of estates in, 576–596
Trusts in, 544–545
Unities of title to, 560
Warranty deed, form of, 595
Wills, origin of, 579
What is, legally, 127, 128
Reasonable time for disaffirmance of contracts, *see* Contracts: infants
Rebutter, 49
Record, bill of exceptions as part of, 60; *see* Real property
Record of trial, what consists of, 60, 61
Use of, on review, 62
What is, 56
Rejection of offer, *see* Contract: offer
Rejoinder, 49
Reliance, right to, on false statement, C 149
Remanding for trial, 63
Remedies, 18–33
Of common law and equity distinguished, 14, 16, 17
Remedy, none unless case within some form of action, 19
Replevin, action of, 24 and 25
Replication 49
Reported cases, use of, *see* Cases: study of cases
Representation, what is, 217
Reputation, security of, protected, CC 158, 159, 161, 163, 167, 172, 175; *see* Defamation
Rescission of contracts, when necessary to invalidate, C 270
Responsibility, for injury, causal connection necessary to fix, C 186
For injury, proximate cause as element of, C 198
For injury to others' land, due to acts done on one's own, C 210
For torts, how fixed, 181 ff.
Responsible cause, as an element of liability for injury, 188
How determined, C 191
Of injury, negligence as, CC 191, 198
Restraint of trade, *see* Contracts
Restriction on use of property by legislation, C 213
Return of process, form of, 51
What is, 42
Review, courts of, functions of enlarged by statute, 64
Effect of, 63, 64
Reviewing courts, function of, 63
Revocation, *see* Agency; Contracts: offer
Reward, offer of, *see* Contracts: offer of reward
Offer of, how revoked, C 266

Rights, enforcement of, 18–65
In personam, 9
In rem, 9
Rule absolute, 57
Rule discharged, 57
Rule *nisi*, 57
Rule of law, more than one from single decision, 73
Rule of law of case, how found, 77

Seals, early use of, 221
Self-defense, C 119
Service of process, 62
How procured, 62
Necessary to jurisdiction of person, 40
Silence as completing acceptance of contract, CC 277, 290
Slander, CC 159, 161; *see* Defamation
Actionable per se, when, C 172, at 174
Distinguished from libel, C 175
Of title, C 156
Social control, law of torts as instrument of, 112
Sources of law, 3–7
Cases as, 65
Stability of legal system essential, 66, 67
Stare decisis, 6, 66
Justification for, and limitations on the doctrine of, 66
Statutes, affecting appellate review, 61
As sources of law, 5
Interpreted by courts, 6
Of Frauds, contracts subject to, when must be in writing, C 339
Effect of, on contracts within its terms, CC 334 and 336
Extract from, 333
Scope of, C 334
What is interest in land under, C 334
Writing required to validate contract under, C 339
Of Limitations, *see* Contracts: consideration
Study of cases, principles governing, 67
Suggestions for, 65–81; *see* Cases
Substantive law, 10
Summons, necessary to jurisdiction, 40
Purpose of, 41
What must contain, 41
Writ of, 50
Surrebutter, 49
Surrejoinder, 49
Syllogism, use of, in study of cases 78–79
Systems of law, 11–18

Time, lapse of, as affecting offer, C 256; *see* Contract: offer
Time, when of the essence of contract, C 385
Title, to chattels, not acquired by conversion, 130; *see* Real property: title
Tort, action of, distinguished from action of contract, 23
What is, 112
Torts, acts which constitute:
Acts on one's own land as, C 208
Conversion as, 130
Deceit or fraud as, C 142, 146
Defamation as, CC 153, 158, 161; *see* Defamation
Fixing responsibility for, 181 ff.
Injury to property as, CC 122, 126
Interference with contracts, as, C 178
Invasion of bodily security as, CC 114, 115, 191; *see* Assault; Negligence
Assault as, CC 114, 115
Negligence as, CC 193, 195, 198, 200
Libel as, C 153; *see* Defamation
Slander of title as, C 156
Trespass as, *see* Trespass
Torts:
Distinguished from crimes, 113
Law of:
Economic basis for, 111 and 112
Instrument of social control, 112
Introductory topics, 111
Protects bodily security, 114
Purpose of study of, 112
Liability for, classified, 113
Distinguished from contractual liability, 113
Distinguished from quasi-contractual liability, 113
What is, 112
Traverse, 48, 49

Trespass, action of, 27–30, C 208
Animals', liability for, 28
Assault as, 27
Force necessary to, 28
Nonfeasance not a basis for, 28
Theory of, 27
To goods, land, or person, 27
To land, C 126
Trespass on the case, action of, 29, 30
Trial, *see* New trial
Close of, 55
Conduct of, 54–59
Opening of, 55
Record of, includes what, 61
Trover, action of, 26, CC 130, 133; *see* Conversion
A form of trespass on the case, 31

Usury, *see* Contract: usurious

Vendors of goods, extent of duty to use care in preparation of, C 122
Verdict, 56
Effect of, 59
Report of, 59
Use made of on review, 64
Verification, 49
Voidable contract, effect of, C 270; *see* Contracts: voidable
Voluntary act, what constitutes, to fix responsibility, CC 218, 181

Wagers, *see* Contracts
Wager of law, 230
Defense to action of debt, 20
Defense to action of detinue, 20
Withdrawal of offer, effect of, 255; *see* Contracts: offer, revocation of
Women, legal position of, 83
Writ of error, 59, 60; *see* Error, writ of,
Affected by statute, 61
Questions open for review on, 60
Review on, does not give right to review facts, 63
Writ, use of, 36
Writing, when necessary to validate contracts, C 245; *see* Statutes: of Frauds
Written contract, enforcibility of, 302